## United States Court of Appeals for the Second Circuit



**APPENDIX** 

75-7430

## United States Court of Appeals

FOR THE SECOND CIRCUIT

RICHARD HUGHES,

Plaintiff-Appellant,

-against-

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

P/5

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## JOINT APPENDIX

(Volume 2-Pages 322a to 591a)

NOV 2 1 1975

A DANIEL FUSARO, CLERA

SECOND CIRCUIT

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basis of opinion testimony by experts. I would just like to read the rule. It says:

Elwell-direct

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing if they type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The point is this: That some of what he is relying on are conversations with others.

THE COURT: That is not the point. That is not my point. I inderstand him to be saying that "I made this investigation and I have come to these conclusions on my own but based on conversations," and that is something But he didn't testify to that. He says that "I talked to these people and I am now going to give you what they told me."

MR. HAGAN: All right, I will try to rephrase my question, your Honor.

(In open court.)

Mr. Elwell, based upon this study you conducted which you described to Mr. Elkind, did you arrive at a conclusion as to why General Motors placed the fuel tank

within the cab of the vehicle in 1949?

- A Yes, I did.
- Q Would you state what your conclusion was?

Elwell-diract

A The fuel tank placed in the cab was Lased on experiences that the corporation had had in prior vehicles which had the fuel tank located underneath the cab and somewhat also underneath the body of a truck, and the experiences were predominantly this:

In the pre-World War II era trucks were not a of a poverful nature and were limited relatively to travel on paved highways. World War II shortly opened up whole new uses for trucks. Some of the experiences had been very shortly after the war and I would suspect, although I can't find documentation of it during the war, that offroad operations of the truck was incurring damage to the fuel tank.

Ripping the tank open would be a possibility, or dislodging the tank from its brackets and mountings.

Analysis by the people at that time was that
the fuel tank could be best protected by putting it in a
location which would prevent this type of damage. There
was damage also to docking situations where the driver
would be trying to park the truck for loading and unloading
and would hit the tank on curbs and things of that sort,

operations.

particularly in off-road use. It was a new vista,

if you will, a new operation and World War II undoubtedly

opened up a lot of more capable trucks for off-road

That was the essential reason, to protect the tank by putting it in the cab where it is invulnerable to damage.

Q Did the effect of possible collision with other vehicles play a role in this decision?

A I haven't found a great deal of information on that. The decision, as far as my opinion was concerned, is that there is no perfect place to put a fuel tank on a vehicle, but yet to consider the collision experience of a vehicle the cab-mounted tank is in the middle of the vehicle as far as front to rear.

As a comparison, if I would put the tank on the front bumper I would certainly protect it from the rear hits by trucks or buses or cars, but it makes no sense to put it there because you know you are going to hit a wall or a boulder or another vehicle in the front.

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Elwell - Direct

This was a good engineering position to be in, mid tank or mid vehicle, protected from the elements, protected from the high centering loads of the trucks.

That is a trucker's expression, but it means that you are going over something and a boulder gets in the middle of the truck or going over a steep hill and you'll end up not being able to quite calculate clearances as you are in the cab and you might scrap the bottom of the truck, and this was the rationale.

Q In 1966, Mr. Elwell, the year this truck was manufactured, did all General Motors light and medium duty trucks have the fuel tank in the cab?

- A Those production vehicles did, yes.
- Q How about the Ford Motor Company?
- A Yes.
- Q Dodge?
- A Yes.

Now, Mr. Elwell, you have had about four years' experience specifically emphasizing the area of fuel system design, the placement of tanks and potential problems of fire in connection with the fuel system combined with your previous engineering experience --

MR. ELKIND: I object to that. I haven't heard anything about this witness having any experience with fires.

18.

THE COURT: His testimony has been that one of his studies, one of his duties, one of the things he did was to attempt to understand the nature of the fires in cars and trucks and to distinguish those that occurred which were not related occurrences. That is what I understood.

MR. ELKIND: Can I then voir dire the witness, if he is going to go into that subject, on his background from 1971, when he became --

THE COURT: No. I think you can cross-examine him on that. He has satisfied me in terms of his testimony that he is competent to testify about that. You can cross-examine him.

MR. ELKIND: Then I will object to the form of the question.

THE COURT: That objection is overruled.

MR. HAGAN: Will the reporter please read my question to the point where I stopped?

(Record read.)

Q -- which you related to us earlier in your testimony.

Sir, based on that experience and directing your attention to the model year 1966 and the state of the art in the industry at that time with respect to the placement of fuel tanks, do you believe that the design of the fuel

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system in the 1966 series 4000 trucks constituted a safe and reasonable design in accordance with the state of the art within the industry at that time?

A Yes, that is my opinion.

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Now, Mr. Elwell, could you describe the type or the types of investigations that you conduct as part of your duties today or at this period in this area, the inter-relationships between fire and fuel?

A If I understand you correctly -THE COURT: Fuel tank systems?

Q Fuel tank systems. You conduct investigations with respect to -- I will withdraw the question.

Did there come a time -- the easiest way is to relate it to this case -- when you were asked to investigate the cause of the fire in this case?

A Yes.

Q Did you have an opportunity to inspect the vehicle?

A No. When I became aware of this case I was also shortly thereafter -- I can't put a point in time -- aware that the vehicle had been scrapped before the case was filed against General Motors.

Ω Did you subsequently form an opinion, sir, as to what caused the fire in this case?

A Yes.

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1	mcpd 4 Elwell - Dir t 627
2	Q Will you state that opinion?
3	MR. ELKIND: May I ask when he formed this
4	opinion, first?
5	MR. HAGAN: We will get into the reasons and all
6	that.
7	MR. ELKIND: I want to know when he formed this
8	opinion.
9	THE COURT: You can ask him that.
10	MR. ELKIND: I will object to the witness testi-
11	fying unless he tells me when he had this opinion.
12	THE COURT: The objection is overruled.
13	Q Mr. Elwell, would you state, please, in your
14	opinion as to what caused the fire in this case?
15	A Yes. My opinion is that the fire was caused by
16	leakage of gasoline in the engine compartment and was most
17	probably ignited by a spark at the distributor or in the
18.	distributor.
19	Q Sir, would you advise his Honor and the jury as to
20	what your reasons are for your opinion?
21	A Well, may I explain how I am getting to it by
22	explaining the evolutionary process that I have to go
23	through?
24	Q All right.
25	A In understanding a petro-chemical fire or gasoline

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fire or oil fire and being not able to look at a vehicle I had to get all the physical evidence together that I could, and physical evidence clearly is pictures. The camera doesn't -- I mean does reproduce what it sees, so that is physical evidence.

I took a lot of this physical evidence and a lot of information that I could get together or people would get for me on what were the occurrences and I came to an opinion putting all of the evidence as I had it in front of me together.

Q What were the reasons that led to that position?

A The reasons are essentially that very early I became aware that it was reported this vehicle had not been able to complete its anticipated run for that day, the four-hour period, I guess, and that was because the fuel gauge was dropping rapidly.

The photographs that I had seen late in 1972, the engine compartment photograph, clearly indicates that the melting of the carburetor and disintegration of the distributor in a fire that was, as I understood it, in the context of the accident. That clearly indicated to me that we had an engine compartment fire with the release of petrochemicals.

Q Excuse me for interrupting. When you mention a

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picture of the engine, are you referring to Defendant's Exhibit B for identification?

A Yes, that is the picture.

Did you arrange to have a blow-up made of Defe ant's Exhibit B for identification?

Yes, I did.

I show you Defendant's Exhibit T and I ask you if that is the blow-way you had made of Defendant's Exhibit B in evidence.

Yes, it is.

MR. HAGAN: I offer this in evidence.

MR. ELKIND: No objection.

(Defendant's Exhibit T received in evidence.)

MR. HAGAN: Your Honor, since we have referred to this at this point may Mr. Elwell explain to the jury with the blow-up the points that he thought important?

Mr. Elwell, will you come down here and describe what areas you thought significant on this particular picture?

A The first area that is significant is the area which used to be a carburetor. Its appearance, of course, is completely distorted now. It is no longer. That temperature to melt the material is approximately 850 degrees, which is not -- which is something that needs to be achieved

to it.

by some kind of a chemcial burning in very close proximity

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18.

This area here used to contain a distributor for the vehicle. That part of the ignition system, the distributor, provides the sparks to the various spark plugs. There were six on this vehicle.

This area here is just overwhelmingly evidence to me that this had to have been an engine compartment fire of a serious magnitude. The air cleaner here suggests to me that there was an air cleaner on it.

Taking the converse of that, if there is not -- if there is an engine compartment fire, as an example, which does not involve the release of the gasoline in this area, it is not unusual at all. In fact, it is the practice to find the carburetor basically not destroyed. The vehicle might be destroyed around it, but this air cleaner sitting over the top of it and the lack of the intense heat that gasoline and vapors burning will produce generally leaves this intact.

Another part of it is that it appears that the fire -- this is a composite battery cover, rubber. It is likened to rubber. Here is rubber over here, and in this area here from the carburetor back is basically burned, but not totally destroyed.

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Elwell - Direct

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Would you explain that, please, to his Honor and

the jury?

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A Okay. That is a pretty complex series of proofs here, but what the proof of this is is that if gasoline was inside of the cab and if I could use this glass of water just to illustrate, let's imagine for a moment these are gasoline vapors inside of a cab. The vapors will exist inside of the cab in a horizontal distribution, from door to door as it is from wall to wall in the glass.

Now, if there was a reason for the vapor to be there and ignition took place, the time for it to be burned would be that fast (indicating). It would be measured in milliseconds. It would be so fast that it would be faster than the eye can blink and, in fact, it is an investigative point in mine explosions, in things of that sort, to see if the eyes of the people that were in the explosion were burned, because explosions occur so fast their eyes don't even close enough to prevent eye damage.

(Continued on Page 633)

used up and it is all gone.

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The second thing about it is that if the vapor is there and it burns that fast, there is no enduring fire; 3 it doesn't keep burning and burning because the vapor is

Q Now, would you stop for a moment there? I would like to explore that point a bit with you.

A

W. . . you say the vapor is used up, you are talking about if there had been gas vapor in that cab --

Yes.

-- and it had ignited in the cab, are you saying, sir, that the fire, the flame, the puff, whatever you want to call it, would have ignited, burned off that vapor and ceased at that time? Is that what you are saying?

A There would be no more fire, except under one other thing that I would have to add yet: that the source of the vapor now has to be explored because the vapor would expend itself and gasoline travels -- the burning velocity in open air is abotu 25 feet per second. And it would go back to the source, and if there was a source that was supplying the vapor, it would continue to burn there, what we call in a low grade fire.

Now, the heat of this combustion would continue to pressurize the fuel tank in the cab and it would have been

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reported that the fire was localized in one particular area, wherever this supposed leak was, and it would have been built from there.

The other compelling argument in this is that the burn injuries are consistent in that I believe Mr. Hughes was burned consistently more than the other two occupants. And if they would all experience this explosition, and again keep in mind that we have a total involvement in milliseconds of all this vapor in the cab, there would have been a uniformity of burn or injury to all occupants. None of them could have been fast enough to avoid it. It would have been, before they could even move they would have been exposed to the explosion.

Secondly, Mr. Hughes was the last one out of the vehicle, and the other two gentlemen, because they were significantly less burned than him, it indicates to me that the fire was a sustaining fire, and a sustaining fire was in the location that Mr. Hughes was sitting, and that was in the middle of the cab.

And how did the fire --

THE COURT: May I ask a question?

MR. HAGAN: Yes.

THE COURT: Am I to understand you to say that if there were vapors in the cab, that those vapors would

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extend from one door to the other, horizontally?

THE WITNESS: Yes, sir.

THE COURT: It would fill the cab from one door to the other?

THE WITNESS: May I explain a little bit on that, sir?

THE COURT: I --

THE WITNESS: Yes. If it was an inch of vaopr in the cab, that inch would want to be across the entire width of the cab.

THE COURT: In other words, it would not. You are saying it would not be concentrated in the middle; it would extend throughout the cab.

THE WITNESS: Yes.

THE COURT: All right.

BY MR. HAGAN:

Q Then let me ask you this question, Mr. Elwell. How did the engine fire under your analysis get into the cab and burn these gentlemen?

A Well, to explain it, there is a picture that I have of the comparable vehicle, the No. 1 vehicle.

Q Yes. Let me get that for you. Identifying Defendant Exhibit J in evidence (handing).

MR. ELKIND: May I see this before the witness

looks at it?

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MR. HAGAN: It is in evidence.

MR. ELWELL: I know it is in evidence. But before you ask a question that relates to this picture, may I ask a preliminary question on voir dire?

MR. HAGAN: I object to this. I am showing the witness an exhibit in evidence.

THE COURT: You can't have a voir dire on that.

BY MR. HAGAN:

Q I show you Defendant Exhibit J in evidence and I ask you is that the picture you referred to of this interior of the cab of No. 1 that you wanted to discuss?

- A Yes.
- Q Would you discuss it, please?

A The power takeoff unit on this truck was located by design on the transmission of the engine. The transmission of the engine is directly rearward of the engine. The engine, then the transmission. Right at the rear fo the engine is the distributor, where the first pop occurred. And right on top of the transmission, right behind the engine, was the power takeoff unit with two control levers sticking up.

Q Where did those control levers come through?

A A tie front of the cab and through holes that are put in the floor by whoever put the body, the dump body, on

the truck. We don't put the body on.

Q All right. Now, would you, with this red pencil, circle the area in the floor where the controls for the power takeoff equipment come through? Just put a circle around it.

Elwell-direct

A (Marking).

Q In relation to the circle you just drew around the power takeoff handles, where is the vehicle transmission, the power takeoff connected to the transmission? Directly below that?

A Directly below that, yes.

Q And are you saying that the flames came into this cab through those holes, transmitted from the engine compartment through the transmission device?

A Yes.

MR. HAGAN: Your Honor, may I show this to the jury?

THE COURT: Yes.

(Pause)

Q Mr. Elwell, am I correct then, sir, and correct me if I misstate you, that it is your testimony that in your opinion the fire started from a leakage of gasolien in the area of the carburetor? Is that correct?

A Yes.

Q That the gas leak transmitted that fire through the power takeoff unit into the cab through those holes you circled on Exhibit J, is that correct?

A Yes.

Q Now, did you attribute any significance in arriving at your determination to the tatimony of the witnesses relating to whether they smelled gas vapor in the cab or not?

- A Yes. That was to me quite significant.
- Q And would you explain that, please?

A The ignition switch -- this was my understanding of what was alleged to be the ignition point. I've been aware of that for some time. I can't tell you, again, how long. But if we assume that the ignition switch was in an ignitable vapor, and further if we make the assumption that the level of ignitability was just at the switch, we had to have in that cab 14,000 parts per million, or about the first 24 inches, as if 24 inches of vapor, very intensive vapor, existed in that cab, and that just at the very tor, where it would ignite with air, the ignition switch.

If we were to accept that, then the smell inside the cab would be overwhelming. It would be a very pungent, unmistakable odor.

Q Gasoline, you would agree, does have a very distinc-

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tive odor, doesn't it?

A Yes, it does.

Q Would you come down here, please, with his Honor's permission, and see if -- well, sit there. Do you know what is in Defendant Exhibit H for identification?

- A Yes.
- Q What is it?
- A Gasoline.
- Q And who put it there?
- A I did.

MR. HAGAN: Your Honor, I offer the vial in evidence. I would make any arrangement that Mr. Elkind wants to or Professor Weinstein wants to to allow them to analyze the contents until they satisfy themselves that it is gasoline. And then I would suggest we can dump it out and just keep the vial and make a note on it "Gasoline."

THE COURT: I would think, so far as I'm corcerned, I don't want to be in possession of any gasoline vial.

MR. ELKIND: May I ask some questions about the gasoline before it is offered in evidence?

MR. HAGAN: Let me make my offer in evidence.

MR. ELKIND: I thought you were offering this.

MR. HAGAN: I'm offering a vial of gasoline in

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2 evidence.

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MR. ELKIND: I would like to ask the gentleman some questions about it. May I?

THE COURT: All right. Remember, this is voir dire now, Mr. Elkind.

MR. ELKIND: Yes.

VOIR DIRE EXAMINATION

BY MR. ELKIND:

Q Is there a variation in the aromatic quality of gasoline, depending on who the manufacturer is?

MR. HAGAN: Mr. Elkind, I can't again see the witness. Would you stand over here?

Q Did you hear my question, Mr. Elwell?

A Are you asking that on an olfactory basis or are you asking that on compounds of gasoline, that aromatics had a branch or group of compounds?

Q No. I wanted to know whether or not the smell of gasoline, for example of Amoco, is different than Esso or Shell is different from -- you name it -- Getty.

A I think I know what you mean.

They do smell differently, don't they?

A I've never detected that. No, not to me they don't. They might to you, but they don't to me.

Q What kind of gasoline is this? What brand?

JG 9 342A Elwell-direct 1 A Exxon. It is Esso. Exxon has now taken over the Esso stations or -- I don't know what. 3 Q You knew that there is gas -- well, I'll save that. 5 MR. ELKIND: I have no objection. 6 (Defendant Exhibit II for identification 7 8 received in evidence.) 9 BY MR. HAGAN: Q Now, Mr. Elwell, would you explain to his bonor 10 and the jury what it is that burns in a gasoline fire, relat-11 12 ing it to the gasoline mixture we have in front of us? A The vapor is the only thing that burns, and that 13 14 has to be burned or it will combine chemically with oxygen, and that is combustion, and then it involves light and that 15

Q Now, if I put a match on that gasoline we see in front of us, Defendant Exhibit H, what will happen?

A Where would you not the match?

is what we call fire.

Q Assuming I put it at the right spot. Assuming that I put it at the right ignition point of the fumes, what would happen?

- A The gasoline will ignite.
- 0 And what will happen after that?
- A You'll get a small fire, a little flame coming off

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Q And am I correct that the flame will be burning the vapors that are rising from the gasoline? Is that correct?

A Yes.

the top of the jar.

Q And the liquid gasoline itself will not be burning, is that right?

A That's right. And there will be an area right above the liquid gasoline that won't be burning either, although it is rich, very rich vapor.

Q Now, am I correct that as this gasoline sits here now there are vapors rising from it?

A There are vapors escaping from it.

Q Where are those vapors, in your opinion? I know none of us can see it, bit in your opinion, from your experience, those vapors that are escaping, how are they dispersing, if they are, in this room? What is happening to them?

A Well, thebasic thing that is going on there now is that if we could imagine the vapor again being visible like a waterfall, as soon as we were to fill up this glass, as the gasoline vapor is doing, it is cascading over the sides, and what I've done in order to visualize that is taken polarized light, and it is basically a reproduction of the sun in that the light beams are sufficiently straight to

catch the shadow of the vapors.

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Elwell-direct

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Actually you can see the vapor shadow, but you cannot see the vapors.

Now, one other way one can do this is, as in early moining, you'll see the mirage on a highway. This is . caused by the polarized light, or parallel rays of the sun, being refracted in the shimmer of the moisture rising.

In this case, the moisture isrising on the highway. In this case the vapor is dropping to the table and then dropping off the edge of the table to the floor.

Now, that is the primary factor that is going on. But there is another. We have air conditioning in this room and there is a natural exchange of the air up at the ceiling being warmer and at the floor, and a roiling of this air.

So that that is also playing a part in bringing the vapors, spreading them across this room. It would not be surprising to me that, like you can smell the gasoline from where you are at is a possibility.

Now, can you tell me, sir, am I correct that we've learned from earlier testimony that the minimum ignition point at which vapors will ignite is 14,000 parts per million?

- Yes.
- And that the maximum is 76,000 parts per million, 0

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is that right?

A Yes.

O Now, am I correct that at some point, if I took a match and brought it down toward that vapor, that at some point I would reach the minimum needed, that is, 14,000 parts per million vapor to air and I would get fire, is that correct?

A That is right.

Q And at what point, in your opinion, and from any experiments you've done, conducted during your studies, would you reach ignition on that fluid we see in front of us, Defendant Exhibit H?

A It would be less than half an inch from the top of the container here, probably down to about a quarter of an inch, right in there.

- Q Suppose I held it about six inches above.
- A No, it won't ignite.
- Q So I would have to go down to about an inch above the fluid?

A No. Less than that. You would have to get down to it.

Q All right. In any event, am I correct that if I did bring a match down there, and at some point it ignited, that that would be physical evidence that at that point I had

246A Elwell-direct JG 13 reached a mixture of at least 14,000 parts per million and maybe more, is that correct? Yes. Now, if I tried to smell that gasoline, holding that mixture about an inch from my nose, would I get a pretty strong whiff of gasoline? Yes. Would it even be healthy to do it? A No, not over the long run. I'm not saying that one smell of it. But it will not be wise to subject yourself to that exposure for long, no.

Q In fact, there are standards, aren't there, that you shouldn't exceed? Isn't it something like four or five hundred parts per million?

That; s right.

Because after that you could get sick from the strength of the smell, isn't that right?

A Headache and nausea.

MR. ELKIND: If your Honor please, I don't know why we need the witness. Counsel is testifying. I object to the form of the question.

THE COURT: All right.

Mr. Hagan, let's get the testimony from Mr.

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Elwell.

JG 14

Elwell-direct

MR. HAGAN: All right.

your Honor, I only posed it because we are at a point now where I would offer to anyone that wishes -- so that the record is clear, anyone that wishes to smell this gasoline, you know, to take a quick whiff of it and stop before we go any further, whether Mr. Elkind or Dr. Weinstein, Mr. Wasserman, anyone, including members of the jury that want to just take a smell of that before we go any further. Because we are going into another area and we won't be able to do it after that.

So the offer is open for anyone who wishes to do it. I would ask your Honor's permission. I don't want to ask.

MR. ELKIND: I don't want to.

THE COURT: I don't think anyone is interested.

MR. HAGAN: May I ask your Honor's permission for Mr. Elwell to ignite the fluid? I am absolutely assured, in fact I have seen this done, so I can also represent, that it will not cause any fire. May I be allowed to do it?

THE COURT: Yes.

MR. ELKIND: I would object, your Honor.

THE COURT: The objection is overruled. You may move, if you prefer.

25 move, if yo

All right.

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(The witness left the witness stand.)

Elwell-direct

MR. ELKIND: It is an interesting show, but I don't know what relevance it has to any issue in this case.

THE COURT: I have already ruled, Mr. Elkind, that he can do it.

THE WITNESS: What we are going to find is the lower limit of combustibility. We will get down to about a quarter of an inch.

(The witness applied a match to the vial of gasoline.)

THE WITNESS: And what we see underneath the flames is no flame, and this is the rich zone of combustion. And what we see coming up is the gases mixing with oxygen and burning.

O So are you telling us now that, as you said earlier, where the match hit, ignited the fuel, in your opinion was the minimum level of combustibility of 14,000 parts per million?

A Yes.

Q And that type of a mixture would have had to be contained in the cab of this vehicle if there had been an ignition of a cab fire?

A Yes, sir.

Q And it is also your opinion that the smell of the

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identification were received in evidence.)

Q Mr. Elwell, with his Honor's permission, would you come down here and, using these blowups, would you describe other matters in this case that you found significant?

A Yes. This is the right side view of truck No. 2 showing, starting at the front, the battery and the first hose, which is off of the power takeoff for the snow plow, which is still intact, burned but not disintegrated.

Then in this area it is important because this shows damage underneath the floor of the cab. The levers and the transmission are in an area approximately right here (indicating). Here is the door, which is in front of the place where you put your feet, and right about in here is where those levers are and here is fire damage that you can see over sie top of the frame and inside there.

Now, the significance of that is that if this was a cab fire, for the moment assume that it was, and its typical description is the up and out pattern of the fire, the source of the fuel would be the lowest point of the fire, usually, and it would go up and out.

Well, in this case, if it was a cab fire there would be no damage down in this engine area here. The damage would be predominantly up here. And in some cases it is very misleading and someone could make the error of

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thinking, if yo' don't know that there is damage here, that this was a cab fire. But it is not.

Elwell-direct

Q This area that you are pointing to, did you blow up that particular area?

Yes.

Q And is that Exhibit O?

A Yes, it is. It suffers from blowups because the quality of the original photographs is the only thing you can work with, and it is getting a little fuzzy, but there is a wire or a tube of some kind and this would be in the transmission starter area, right at the edge of the engine, and it is burned and you can see burn areas in here, of rundown.

What this means to me is that, with the incl nation of the engine, with the front of the cogine higher than the rear, leaking in the carbureter area will run across and down the engine onto the transmission and will burn in this area here.

And this area happens to be just slightly forward of those openings in the bottom of the floor of the truck, and it is not consistent at all with a cab fire as an origin.

This area here is the enterior of the No. 2 truck, and the significant part about this is that this was a sustaining fire. It continued to burn until the Fire Department came.

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O What do you mean by "a sustaining fire"?

A Well, it wasn't a flash fire that just exploded and that was the end of it, and it continued to burn. Yet the only source in the cab for this flammable liquid that I've been able to find would be the fuel tank. Yet all of the unburned ingredients left in the cab are right next to the fuel tank, and I believe this could be portions of rain gear or something.

Here is a portion of the seat which remains. Here is what looks like a ladies handbag or some jewelry laying here. And we see some particles remaining right here of the seat.

This next picture here --

S. 0

A Yes. S is a picture of the other side of the cab, still looking behind the seat, and all of this is unburned.

Q All of what is unburned?

A What I'm pointing at is what looks like cloth, because here is a zipper. This could be a coat or a jacket behind the seat that is unburned. It is damaged by heat, but it is not combusted to the extent that the area up here is.

Now, here on the floor we have a shoe and another part of the jacket, and I'm not entirely -- I can't relate

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this, because I'm not sure they were standing on it when they were in the cab. This could have been put in after the fire was extinguished.

But this is significant in this area because this tells me that when the firemen overhauled the vehicle that there was a lot more seat material remaining right at the back which is in the proximity of the fuel tank; there is a lot of material there.

If this was a burned out portion of the seat material, it would be black. But it is white, and it is like you pull the material apart, ripping it out, and --

A JUROR: Is that flammable material?

(Pause)

Q All right. Go ahead. Continue.

A This is padding for theseat and this is the seat material, or fabric which is in that area. And, again, the significance is that if the fuel tank had been a source of liquid and vapor, that would have been the area that the fire would have immediately gone to and continued to burn.

And yet in the cab that's the place that is least damaged of all.

Q Okay. Thank you.

THE COURT: I think it is time for us to suspend.
We've had a full day.

\* \* \*

MR. ELKIND: Your Honor, while we are on the subject of those pictures I want to advise the Court and L. Hagan that during the cross-examination of the witness who is now on the stand, Mr. Elwell, I would want to use those pictures for identification so that the witners, Mr. Elwell, may observe the location of the burn sites, because he made certain statements with reference to deductions that he drew from the location of burns and the absence of, for example, injuries to the eyes.

Now, I am ready to be guided by your Honor. I don't want to be accused of pulling any dirty tricks and I am ready to be guided by whatever suggestion your Honor has on this subject, but I think that the pictures are now going to become quite material and I am going to re-offer them in evidence, but I just wanted to advise the Court on the subject in advance, before it does occur.

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THE COURT: Let me explain for the record my own view of this matter.

I think you are entitled, certainly in view of Mr. Elwell's statement, to describe these injuries in whatever detail you feel is necessary. My reason for keeping the pictures from the jury is not, as I think I tried to make it clear, to prevent the jury from obtaining an a wrate picture of what happened to Mr. Hughes but because of the fact that I thought that his own description of what occurred and the doctors' was sufficient and that all these things would be inflammatory, would add to the sympathy of the jury and would take away from them what they are required to do, that is, to make an objective evaluation of the facts, and I don't see anything that can be gained by that.

Now, insofar as your cross-examination of Mr. Elwell on the injuries and so forth, I would prefer that you not use the pictures, but I am not going to interfere with the cross-examination if you don't feel that you can give an accurate description of what occurred to this man.

But those pictures are not going to be placed in evidence, they are not going to be shown to the jury, not during the course of this trial, and I think we ought to be clear on that.

As I said, I don't even like the idea of

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utilizing them to show to Mr. Elwell. But, if you don't believe that you can describe these injuries with sufficient specificity to allow Mr. Elwell to comment on them in view of his testimony about what would have happened if the fire had occurred in the cab, then I obviously can't interfere with that. I'm not going to interfere with your examination.

But I do think that you could do it, and I don't think that your cross-examination would be harmed, by describing to him what the injuries were so that he could comment. But it is your case and all I can do is try to keep order and whatever clarity is necessary as this case goes along.

All right. Get the jury.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY'S QUARE, NEW YORK, N.Y. - 791-1020

11-3-AM

MR. ELKIND: Your Honor, I recognize that rulings on a matter such as a photograph of injuries lies within the sole discretion of the Court, and what I would like to know from your Honor, frankly, is whether it would be futile for me to make any argument toward your Honor's discretion or whether you've completely made up your mind as indicated.

Elwell - Direct

THE COURT: I have made up my mind. That's why
I made the statement for the record. I think that
Mr. Hughes' injuries have been very adequately described,
in sufficient detail to enable the jury to understand them.

And, as I said, insofar as Mr. Elwell is concerned, if you don't believe that you can describe the injuries sufficiently in order to attack his credibility in respect of his statement about what would have happened if the fire had been in the cab, I certainly think that you would be entitled to use the pictures for that purpose. But my own feeling is you could describe the injuries just as well.

RONALD E. ELWELL, resumed.

DIRECT EXAMINATION (Continued)

(Jury present.)

BY MR. HAGAN:

O Mr. Elwell, yesterday, when I was examining you, I failed to ask you to demonstrate to the jury, by using

Plaintiff's Exhibit 42 in evidence, just exactly how this filler neck and its two clamps connect to the fuel tank by using the parts that were taken off the sister vehicle No. 1.

Would you be good enough, with his Honor's permission, to come down here and demonstrate how this happened?

- A Yes. Should I leave this on?
- Q I think you had better leave that on.

A Yes. This part and this clamp are located on the filler neck and they penetrate down about a distance, as this part from truck No. 1 demonstrates, about threequarters to one inch of engagement on the filler neck.

After this is inserted on, this clamp is similarly tightened as this one up here is so that this clamp, which is loose now, has been loosened to remove the tank and the filler neck, and this is tight, as tight as this one, after the truck is assembled.

O Okay. Thank you.

THE COURT: I am not mechanical, and maybe the members of the jury aren't either, but are you saying that that part which you are holding in your hand is inserted inside what you call the filler neck?

THE WITNESS: No. This tube accepts a portion

THE COURT: Inside

THE WITNESS: And it is inside, as this is inside, both pieces.

THE COURT: And then the clamp goes around both?

THE WITNESS: Yes. And this hose demons rates

the tightness of the clamping in that here we have the

pattern that has developed under the tightening process.

And, of course, now it can't, but you could line up and

I can right now line up the way it was tightened during the

Q Referring to Exhibit 42.

manufacturing process. The marks indicate.

A Yes, sir.

(Continued on next page)

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Q By the way, Mr. Elwell, you are aware, are you not, that the filler tube, Exhibit 42, was taken out of Truck No. 1, as we were advised by plaintiff's counsel and Mr. Weinstein, several weeks ago, May 3rd, I believe it was, of 1975; is that right?

A Yes, sir.

Q At that time it had been in Truck No. 1 for approximately nine years or two months short of nine years; is that correct?

A Yes, sir.

Q What condition did you find this filler next -THE COURT: We have covered that, Mr. Hagan.

MR. HAGAN: I'm sorry.

THE COURT: Mr. Elwell has already answered that.

Q Yesterday we were showing his Honor and the jury these blow-ups of certain portions of the vehicle that had been involved in the fire, Truck No. 2, and you were pointing out certain items and we neglected for the record to mark on these exhibits certain areas that you were describing such as the carburetor. Would you come down and mark what we were talking about yesterday so there is no question in anybody's mind as to what your testimony is on that?

MR. HAGAN: Is that all right, your Honor?

THE COURT: Yes.

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[The witness stood at counsel table.]

The carburetor was originally located -- still the remains of the carburetor [indicating]. This is the carburetor and the area that we were talking about closer to the cab or behind the carburetor [indicating], and that is what was called the distributor and that used to be here, in this area here [indicating].

Q Can you see it on that photograph now, the distributor?

THE COURT: They probably should be marked as C or D.

Q Why don't you write "carb" or "dis" so people will know what the circle represents.

A Yes.

Is that distributor still visible on that photograph?

A No, not entirely. Well, there is only a small identifiable debris in this area of the circle.

These are portions of -- these little lines which look now like white or gray lines in the photograph are actually relatively white remnants of the wires that used to feed the spark to the spark plugs, but they are carbon cord wires and they will combust and burn in the fire and leave

the nylon interwoven layer within it as a charred debris,
and it is white. This is what we are seeing here [indicating
This is the location, I believe, this part right down here,
and I will put a line through it, It looks like the remnants
of the coil and it was sitting alongside of the distributor
and, again, it is pretty disintegrated. The whole top of
the case is disintegrated.

Elwell - direct

Q Using Defendant's Exhibit K in evidence, which is a picture of the interior of Truck No. 1, can you show his Honor and the jury how the carburetor and the distributor and the coil on those items looked without a fire, that is, in a normal condition?

A Yes. This is the interior of the engine compartment again. Would you want me to circle that?

Q I think you'd better.

A All right. This is what the vehicle had as a carburetor before. This would be this area I'm circling here, and this area which I will circle here is the distributor which contains seven wires going to it, and this I'll draw a third circle around. This one is the coil[indicating.]

Shall I name them, too?

Q I think just the circles there are sufficient.

MR. HAGAN: Could we pass that to the jury,

since it is a small photograph?

THE COURT: Yes.

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[Pause.]

Q Have you finished marking that first blow-up, which is Exhibit C?

condition in the front, this being the battery and this being some of the hydraulic hose feeding the snow plow. As I understand it, this was the portion of the controls inside the engine compartment that controlled the snow plow attachment. It is on the truck but the snow plow is no longer on the truck in these photographs, and we were speaking about that.

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Q Will you describe and mark your descriptions on this Exhibit P, please.

A One of the significant areas that we were discussing vesterday was in this portion, which can just be seen in the fender well, and this is a burned area and charred and indicates at this point of magnification that this was something in here that had burned.

Diwell - Direct

Then we discussed yesterday using this blowup that this area now is the same area that I previously circled and we can see a little more clearly that there is burned damage and run-down and charred pattern in the area of the transmission engine right directly underneath the front dash panel or the front of the cab portion of the vehicle.

- Q Referring to Defendant's Exhibit Q in evidence?
- Yes, sir.
- O Now please refer to Exhibit R. Well, R -- we were discussing the debris, the unburned debris that was existing behind the seat and adjacent to the fuel tank of the cab, and that would be (indicating) -- then there is more seat material over here (indicating).

MR. ELKIND: Isn't this repetitious of what we had yesterday?

FOLEY SCUARE, NEW YORK, N.Y. CO 7-4580

THE WITNESS: That was the area we were discussing. MR. HAGAN: We are just marking for the record the

A Yes. This was from the right side of the vehicle and again we were discussing the material in this area (indicating), which would be the area closest to the fuel tank behind the seat.

MR. HACAN, Thank you very much. You may resume the stand.

(The witness resumed the stand.)

Now, you are aware in coming to your own opinion,

Mr. Elwell, that the passengers testified that the one in

the middle, Mr. Hughes, and the one on the right, Mr. Ollert,

testified about seeing flames come out from under the dash

and that Mr. Brennan, the driver, testified that he first

saw flames through the window and then they came out from

under the dash.

Now, did that testimony or evidence relate to your analysis of where the flames entered the cab?

MR. ELKIND: I object to he form of the question.

- Ω Was it a factor in your arriving at your conclusion as to how the flames had entered the cab?
  - A It was a substantiating factor.
  - Q Would you describe in what manner it was a

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substantiating factor?

A Well, to be precise, Mr. Ollert, I believe, indicated that he heard a pop or explosion, a firecracker type pop. Now, that would be very consistent with an ignition at the distributor of gasoline vapors. The distributor, a preponderance of it, is totally enclosed and this pop would have been the ignition of the gasoline vapors inside the distributor.

Then he did not hear and see a pop, as I understood his testimony, but heard a pop and then saw the flames underneath the dash. That was significant. If it had been a pop under the dash he would have also seen the pop, that would be for certain because the combustion is involving a great deal of light or flame. That would have been simultaneous, and they weren't.

The second thing is that Mr. Brennan's first indication, I believe, was the flames in front of the windshield. Now, flames cannot exist in front of the windshield unless they are not in the cab.

O Did you hear Dr. Weinstein, when he was marking the exhibit up there -- did you hear his explanation of Mr. Brennan's testimony? I refer you now to Exhibit 50 in evidence, the exhibit that Professor Weinstein used in describing that matter.

Α	Yes,	I	heard	that
	,		* * * * * * * * * * * * * * * * * * * *	

- Q Do you remember Professor Weinstein's testimony that even though those flames were on the other side of the windshield they were really in the passenger cab area as well?
- A Well, I believe that he was implying that or I could have gotten the implication that that was so.
- Q Do you agree with Professor Weinstein on that point?
  - A No, I asn't.
  - Q Why not?
- A Because the area he is describing as being rearward

  I believe he used the word fire wall is in fact outside of
  the cab and is above, if you want to call it, the sheet
  metal division between the cab and the engine compartment.

  The area he was describing is about the fire wall.
- Q In connection with your analysis here, did you also arrange to blow up two of the photos put into evidence, Exhibits 4 and 1?
  - A Yes.

MR. HAGAN: We have here what has been marked

Defendant's Exhibit U, which is a blow-up of PlaintLif's

64 in evidence, and Defendant's Exhibit V, which is a blowup of Plaintiff's Exhibit 1 in evidence. I would offer

them in evidence at this time, your Honor.

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THE COURT: What are they?

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MR. HAGAN: They are a blow-up of two of

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Plaintiff's pictures of the burned truck.

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THE COURT: The burned truck?

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MR. HAGAN: Correct. I offer them in evidence.

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THE COURT: Received.

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(Defendant's Exhibits U and V received in evidence.)

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THE COURT: When were those pictures taken? I

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don't mean when were the blow-ups made. I mean when were

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the plaintiff's pictures taken?

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MR. HAGAN: The plaintiff's pictures were taken,

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in accordance with the Answer to the Interrogatory, five

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days after this accident.

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again, using these two blow-ups, would you please explain

Q I'm sorry to keep you moving back and forth, but

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what you are talking about here about the area from in front

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of the windshield?

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A The damage that we were looking at in a frontal

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view of the truck, as I believe, was pre-existing damage.

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Q Which damage are you talking about?

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A I'm talking about this area now and this creased

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area here (indicating).

This occurred before the fire.

2 O Can you describe what parts?

A I'm pointing to the hood of the vehicle. What has resulted from that is that the hood is no longer fitting the opening which it was intended to fit and it has moved it upward and appears, as it is here, cocked. It is not sitting where it belongs and it is disturbed by this damage here.

The significance of that is in this photo here, which is V, we see again that this area back here, because of this damage, is raised and that raising of the hood or dislocation of the hood would have caused or allowed the burning gasoline in the engine compartment to come between the hood and the seal which would normally be there.

I believe that that is on the driver's side where this seal was and the hood is lifted up in this corner.

This would be an explanation to me of why Mr. Brennan saw the flames between the windshield and the hood.

(Continued on Page 674)

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MR. ELKIND: I move to strike out this testimony. your Honor, and ask that your Honor instruct the jury to disregard it upon the ground that there is no evidence to justify the witness' assumption that there was some accident or that damage as shown on Defendant's Exhibit V was before or after or at the time of the fire, so that there is no basis for any such inferences.

THE COURT: I think what you would be allowed to do is query the witness on that when you cross-examine him, examine him on that conclusion. I gather that he is making the assumption as an expert that this was not damage caused by the fire, and you have every right to query him about it as to whether that is valid.

MR. ELKIND: Obviously, your Honor, it could have been caused after the fire, too. This picture was taken five days after, and there is no evidence on it.

THE COURT: You may inquire about it, but there is no basis to exclude it.

Q While we are on this damage point, Mr. Elwell, referring to Exhibit V in evidence, and directing your attention to the right front door, do you see any structural damage to that door other than fire damage?

> Yes. A

Will you describe it, please, and circle it? 0

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Elwell - direct

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A Okay. This area at the front or the leading edge of the door is not parallel to in meeting with the front or rear edge of the fender sheetmetal. It indicates that wasn't obviously a melting situation. It didn't occur in the fire. But this area was pre-existing damage also to the door.

MR. ELKIND: I object to the pre-existing damage statement as being purely speculation on the part of the witness.

> THE COURT: I make the same ruling about this. [The witness resumed the stand.]

Now Mr. Elwell, were you here in court this week when Deputy Chief Lennon of the Weehauken Fire Department testified?

A Yes, sir.

Q And you are aware, are you not, that Chief Lennon appears to be, as far as we know, the only evewitness to the condition of the engine after the fire?

MR. ELKIND: Objection to the form of the question. This is direct examination and I suggest the question is leading. How can he ask that of a witness, that he is the only -- he said, "When Lennon testified," and then he said, "Are you aware that he is the only one that testified as to the condition," and I think that is improper.

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Elwell - direct

THE COURT: Read the question.

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[Question read.]

THE COURT: I don't understand the objection.

MR. ELKIND: My point is that counsel may make that argument to the jury if he wishes in summation, but I don't think it is a proper question to put to a witness on direct examination.

MR. HAGAN: I will rephrase the question, your Honor.

Q Was it your understanding, Mr. Elwell, that Chief Lennon was the only eyewitness to the condition of the engine after the fire?

MR. ELKIND: I object to that as immaterial and irrelevant.

THE COURT: I am not going to be able to deal with this intelligently because I gather this is a preliminary question.

MR. HAGAN: Yes, it is.

THE COURT: The objection is overruled. Go on to the next question.

Are you or are you not aware?

THE WITNESS: It is my understanding that Chief Lennon was the only individual to have examined the fuel lines and the condition of the fuel tank on the truck.

Q And you heard his testimony here in court when Mr. Elkind was examining him on redirect as to which portions of the fuel lines were or were not melted; is that right?

A Yes.

Q Did that have any significance to you?

A It was certainly supportive evidence in my opinion of the conclusion that I previously reached.

Q In what way?

A Well, if for the moment we discuss the engine compartment fire, I believe what Chief Lennon was referring to was that area of the carburetor where a portion is attached from the fuel line to the carburetor there is a -- and it is partially destroyed and you can see remnants or pieces of it there still remaining.

Now, if we discuss it in context of a cab compartment fire and the origin of the flames would be the origin of the leak, then the destruction or the line would have occurred at that point, or should have. But since there wasn't any, it is supportive and very conclusive that the initial leak which was also leaking gasoline during the burning experience as a possibility was in the engine compartment.

Q Do you remember that Mr. Brennan testified that he got out of the vehicle and then got back in the vehicle?

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Elwell - direct

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Yes.

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24 25 Q In connection with the point -- although we are

looking at the other side of the truck, the right-hand passenger side -- in connection with the point as to whether or not a passenger in this cab would have smelled gas vapors and what level they would be in the cab, did you consider the significance that Mr. Bremnan, though he had gotten out

Yes, it was very significant.

Explain that using Defendant's Exhibit V.

of the cab and got back in, said he did not smell gas fumes?

Well, if the cab had been filled with vapors it must have been filled during the time in which he was not in the cab as well as if he was in the cab. It isn't that you leak and then later you stop and then later you start again. That is just inconsistent.

Now, the level of the handle is about eye level.

Are you referring to the handle on the door?

Yes, it would be down from the window opening about this much in the photograph. It would be proportionated less. Mr. Brennan would be standing on the ground, not on the step, and as he opened the door his nose and his face would be at about level with the ignition key, about level with the steering -- below the steering wheel where it meets the dash and his face would have been right in 14 parts per million of gasoline.

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Q Mr. Elwell, based on your analysis of this fire and the conclusions that you reached as to the origin of the fire, would it have made any difference, sir, where the fuel tank in this truck had been located?

A Absolutely not.

MR. HAGAN: I have no further questions.

Your Honor, may we approach the side bar?

THE COURT: All right.

[At the side bar:]

MR. HAGAN: Your Honor, before the crossexamination starts I would like to apply to the Court for
certain preliminary rulings in light of what happened yesterday during Mr. Elkind's examination of Mr. Miller, and
I am referring to the practice of asking a question and incorporating in the question facts which get before the jury
before an objection can be made.

ask that the Court direct that no questions be posed to this witness about design industry standards post 1966 on the grounds that they are irrelevant to the issues in this case. We are dealing with a truck manufactured and assembled in 1966. The state of the art in the industry during that year and for prior years is certainly relevant. However truck manufacturers were making their trucks at that time is

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relevant. But how people make trucks five and ten years later is irrelevant and this is the principle embodied in the new Federal Rule 407.

Just as a sidelight, your Honor, in reading the commentary, the principle goes all the way back to an English baron who once said:

"The principle rejects the idea that because the world gets wiser it was foolish before."

And it is also supported by public policy that subsequent design changes should not be discouraged in products by being allowed to be shown as admissions of prior fault or negligence.

So, I am asking that a direction be made that there be no questions along the line of: Isn't it a fact that nowadays they don't put the tank there? Isn't it a fact that -- and also, your Honor, one other point.

THE COURT: All right.

MR. ELKIND: I want an opportunity to respond.

THE COURT: Of course.

MR. HAGAN: The other point is that he wanted to read in an admission the other day about "When did you stop making this," and the implication was that we must have stopped making it because it was a defective type thing: Isn't it a fact that you stopped making it in 1966 -- that

kind of implication, which is just a lot of argument, and the jury has already gotten that, your Honor. That is my application.

MR. ELKIND: The one area, your Monor, where the Courts with increasing regularity are permitting evidence of post-accident changes in delign are those cases, such as the present one, which leal with strict liability based on defective design, and the Courts have said, beginning with the California case --

MR. WASSERMAN: Ault v. International Harvester was the most recent one, and then in Illinois there is the Sutkowski case, and I could provide your Honor with the exact citations in the afternoon session. They all stand for the principle that subsequent design modifications are not admissible to show negligence. That is the policy behind the rule that Mr. Hagan mentioned and that is the rule in the proposed Federal Rules that applies.

It is true that it cannot be shown, cannot be introduced to show culpable conduct in establishing negligence. It can, however, be used if there is a cause of action in strict liability in court where the defendant's conduct is relevant, but where the attention that the jury must focus on is the product itself, qua product, and the cases have distinguished it very clearly, your Honor.

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THE COURT: I would suggest that you get those cases for me to look at before lunch. My own view about this is that I think there would be no basis for Mr. Hagan's argument if the plaintiff had introduced evidence to show that the changes in the design was due to the recognition of the fact that there was fault.

MR. WASSERMAN: / Liability is a no-fault concept.

THE COURT: But the point is that what you are doing now is to show that improvements in design, therefore, reflect back on the fact of what happened before this accident occurred, and there is testimony to the effect that all these people were putting in --

MR. ELKIND: The three manufacturers.

THE COURT: The big three were designing the trucks in this way. The only evidence that the plaintiff had about this being defective in design is the opinion of Professor Weinstein.

MR. ELKIND: Yes.

THE COURT: There has not been any evidence to show that there was a recognition of the fault; that there was a change based upon that.

You get me those citations. As a matter of fact, if Mr. Elkind's examination goes to that point, I will take a recess and read the cases, but I am not persuaded with

the state of the evidence at the present time that you are entitled to raise that inference when you have laid no foundation for it.

MR. WASSERMAN: I might also point cut that
the landmark decision in New Jersey, Henningsen v. Blocmfield
Motors -- in that case the Supreme Court of New Jersey ruled
that evidence of defect which was comprised of, A, the
expert's opinion and, B, the plaintiff's version and that
coupled with the absence, I believe, of the physical evidence was sufficient to create a jury question as to bether
or not a defect existed and whether a warranty breach was
therefore made.

In addition, what your Honor mentioned regarding the fault of the manufacturer in negligence as opposed to no fault strict liability -- I think Mr. Elkind would probably welcome a cautionary instruction to the jury that they are not to consider evidence of subsequent design modifications as to the negligence count but they are free to consider it as to the strict liability cont.

MR. ELKIND: As a defective design.

THE COURT: As I read some of these cases, I noticed that it was held, as I understand it, that the fact that the other manufacturers were designing their products in the same way some evidence of a lack of a lack of a

11 mcsr Elwell - direct

defect. I don't know any cases that support the view that you have indicated. I certainly am open to being educated, so please get me the citations and if we get to a point where we have to take a recess, I will take a recess and read them.

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And in your opinion you indicated that you thought that if the fuel tanks were located outside the cab and the truck used for off-street use, off-road use, that the fuel tank was vulnerable to external environmental forces, rocks and things of that kind, that might affect the integrity of the fuel tank. Do you remember giving that testimony?

A Yes, I remember that.

Q And you mentioned a number of risks in your direct testimony that were involved in having the fuel tank outside the cab. Do you remember mentioning the number of risks that were involved in having the fuel tank outside the cab?

A No, no, I don't remember that. I remember the point that you had made just prior to this last question.

Q Well, let me see if I can refresh your recollection by referring to your actual testimony.

Do you recall testifying, at Page 622:

"Some of the experiences had been very shortly
after the war, and I would suspect, although I can't
find documentation of it during the war, that offroad operations of the truck was incurring damage to
the fuel tank. Ripping the tank open would be a
possibility, or dislodging the tank from its brackets
and mountings."

And then you said: "Now, analysis by the people

1	jgpd	Elwell - Cross 694
2		at that time was that the fuel tank could be best
3		protected by putting it in a location which would
4		prevent this type of damage."
5	1	A I remember saying that.
6		Q Do you remember saying that?
7		A Yes, sir.
8		Q And then you said: "There was damage also in
9	1	docking situations, where the driver would be trying
10		to park the truck for loading and unloading and would
11		hit the tank on curbs and things of that sort,
12	# # # # # # # # # # # # # # # # # # #	particularly in off-road use."
13		A Yes, I remember saying that.
14		Q And then you said: "That was the essential
15		reason, to protect the tank by putting it in the cab,
16		where it is invulnerable to damage."
17		Do you remember that?
18		A I remember saying that, yes.
19		Q Now, all of the considerations that you referred
20	to in	your direct testimony that prompts butting the
21	gasol	line tank in the cab referred to the protection of the
22	gasol	line tank.
23		A Yes.

Yes, absolutely right.

Is that a fair statement?

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O Nowhere in your testimony did you state as one of the factors that had been taken into consideration in making that decision the question of the safety of the driver of the car or the passengers in the cab; you made no reference to that whatsoever, is that correct?

A No, sir, that's not correct.

- Well, can you show me anywhere in your testimony where you did make any allusion to indicate that General Motors, the people who made this decision back in 1949, had considered the problem of exposing people, as opposed to gas tanks, to harm by putting the gas tank in the cab of the truck? Did you make any such reference in your direct testimony?
  - A May I explain?
  - Q No. Just answer yes or no.
  - A No, I didn't use the words that you just used, no.
- O Did you use any words even by inference which suggested that one of the considerations in the design decision to put the gasoline tank in the cab of the truck had taken into account the safety of the people that would be sharing that cab with the gasoline tank?
  - A Yes, I did.
- Q Well, would you please call my attention to that part of your testimony?

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Would you please open it to the reference which you just read?

Elwell - Cross

- All right, sir.
- That would assist me.
- All right, sir (handing transcript).
- May I explain and read?
- Where are you reading from?
- Page 623: "That was the essential reason, to protect the tank by putting it in the cab, where it is invulnerable to damage."

That means that if you were to put a fuel tank in a location and have the gas tank ruptured and spill 20 gallons of gasoline under this cab, and that gasoline was to ignite, you'll have such an enormous fire that I don't think somebody under those conditions would be able to exit fast enough, and it is a tremendous and compelling fire, sir.

And to protect the tank is to protect the passengers And if you don't violate the tank and it doesn't leak, then you don't have a fire. But if you allow 20 gallons to leak because of an inadvertent accident in a docking situation or off-the-road, and surround that truck with 20 gallons of casoline, you've got a very bad situation on your hands.

In other words, what you are saying then is that

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although you testified that the essential reason was to protect the tank by putting it in the cab where it is invulnerable to damage, that what you had in mind at the time was that it would be safer for the people, even though you spoke only in terms of the gasoline tank?

- A Well, yes. There is quite a bit more to it.
- O Let me just take that.
- A Okay.
- O Now, one of the alternatives to putting the gasoline tank in the cab is putting it along -- perhaps you can help me. What is this called here (handing photograph)?
  - A This is the main frame rail.
- O Frame rail. That is the term I was searching for.

One of the alternatives would be placing the gasoline tank under the body of the truck and alongside of the frame rail, as shown in Plaintiff's Exhibit 33.

That is an alternative location, is it not?

- A Yes, I agree to that.
- Q And, as a matter of fact, in your manuals for this particular truck they indicate that at the time that you were manufacturing the truck with the gasoline tank in the cab there were also a number of trucks that were being manufactured with the gasoline tank along this frame rail as shown

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in Plaintiff's Exhibit 33; that's correct, is it not?

A That's correct. The capacities of the tanks, though, are significantly different. That I think should be pointed out, that these tanks that are put out here that you are talking about are for highway vehicles where long range is the prime consideration for the vehicle.

Ω You mean you can put more gasoline in the location shown on Exhibit 33 than you can on the tank in the cab?

A In 1949, I think that's what we were discussing --

Q 1966 is the time that this truck was made.

A Oh, I thought you were asking questions about why we put it from one place to another in 1949.

But, yes, the range of the vehicle now was 17 to 18 gallons of usable capacity, as I recall, in 1966 trucks, and big highway trucks with ranges that require more volume of gasoline before they go to another station have used larger tanks, 80 gallons, a hundred gallons capacity. They have usually put one on each side.

Q Would you draw a circle with this green pencil, or an oblong if that's more appropriate, on Plaintiff's Exhibit 33 in order to show the place where casoline tanks were placed in some models in the 6000 series?

MR. HAGAN: Your Honor, when we start mentioning the 6000 series, there should be an explanation, I think,

for all of us. He is starting to mention a heavy duty truck as opposed to the medium duty, and now we are talking 6000 series. This is the 4000 series. So there should be some explanation.

Elwell - Cross

MR. ELKIND: Yes. I think I misspoke.

Actually I meant to ask about the 4000 series.

A Oh. Well, if my recollection is correct, as an option the purchaser of the cab and chassis could have the option of having the highway tanks located. And you want me to draw the general area where the highway tanks were?

O Yes.

A I'll extend it, if you don't mind, some place down here (indicating).

Q Is there any reason why you extended it down into that area?

A Well, the tanks are usually like 50-gallon tanks. They are quite big and they are characteristically round, cylindrical tanks. So I know that they go down below the frame rail, and I don't know where to put this line, but I just kind of put it so that it is right around where the step is. That's what my intention was, to get into an area like where this step is.

Q Will you mark "Tank" right in the middle of that?
Put the word "Tank" there.

A Okay (marking).

MR. ELKIND: May I have permission to show this to the jury?

Elwell - Cross

THE COURT: Before you show it to the jury, I want to be sure that I understand it. The theory is that if I understand it, the jury understands it, and if I don't understand it, the jury doesn't either.

## BY THE COURT:

Q Am I to understand that what you are indicating is that in the type of truck that is involved in this case the purchaser had an option to have the tanks where it was, in the cab, or have the tanks as are being shown on that diagram? Is that correct?

A Yes, as long as I didn't say the same tank can get put in two different places. They are entirely different.

But you are right, yes, sir.

Ω But the option was on that kind of truck, not on a different kind of truck.

On that kind of truck, my recollection is yes.

THE COURT: All right. Now show it to the jury.

(Pause.)

## BY MR. ELKIND:

Q When a gasoline tank is installed and used in the manner shown in Plaintiff's Exhibit 33, that tank is of

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course below and behind the passenger compartment, isn't that correct?

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A Yes.

O So that if there is any damage to the tank by a rock or by striking it, the gasoline will leak from the tank behind the passenger compartment and below it; that is right, is it not?

Elwell - Cross

A No. If he is backing up, it will actually be leaking out of the tank and under the cab. It depends on what he is doing, going forward or backward.

Q Backing up, he can't strike the tank, can he?

Doesn't the tire, the position of the rear tire, make it impossible for him to damage the tank backing up (handing photo)?

A Well, the picture is foreshortened by the angle of the truck. There is really some distance in between here.

And as this truck here is shown, with the front wheels turned, and if he were backing up, he would be swinging in an arc, so that a curb or a post, a guiding post, or something like that could be here. He would miss it with the rear wheels and the guide posts would go right in through the tanks.

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(Continued on Page 702)

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Q What you are saying, then, is that there is a possibility, a possibility --

A I think --

Q -- of striking the gas tank and damaging the gas tank going backwards, is that correct? Is that what I understand your testimony to be?

A Well, going backwards is one part, yes. He could high center the load. Or in a dump, a garbage dump situation, they don't keep everything all like a highway and there could be steel sticking up or bent frames or something that this truck would be going over, and the front wheel would go over it and then cause the metal to spring up in such a fashion that it would be poking into the tank and the truck just riding over those pieces of metal or bars or whatever.

- Q And it could damage the cab.
- A It could, yes.
- Now, once a gasoline tank is damaged, the gasoline might possibly come out of the tank, and that is the hazard that you spoke of.
  - A That is the hazard we are speaking of, yes.
- When the gasoline comes out of the tank following that possible accident, the problem is not the ignition of gasoline, is it? Gasoline, as you've demonstrated here, doesn't burn, it is the vapors that one has to be concerned

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Yes.

Q Am I correct? And those vapors, to begin with, are far below the cab of the truck, are they not?

A Well, I guess you have to give me the conditions that you want me to speculate on.

Q Instead of going into any special conditions, I did understand from your testimony that you agreed with Professor Weinstein that gasoline vapors are heavier than air and that they have a tendency to rop, is that right?

They have a tendency to drop, yes.

Q And any break in the gasoline tank would be below or underneath the place where the passengers are seated, isn't that correct?

A When the gasoline is exiting the tank, yes, that would be below. If you are talking about the tank, where we had been just discussing, yes.

Q And you spoke then of the state of the art and indicated that the Big Three, which would be General Motors, Ford and Chrysler, were building medium duty trucks at that time and that it was, one might say, the standard of the industry in medium duty trucks to have some of the trucks with tanks in the cab, isn't that correct?

A I believe I said that a conventional cab design

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1	3 jgsr 392A Elwell - cross
2	cab chassis design for all three of them did include that
3	as a standard production fuel tank, yes.
4	Q Now, there are other manufacturers of trucks
5	besides the Big Three, are there not?
6	A Yes.
7	Q And they did not follow that procedure uniformly,
8	did they?
9	A Now we are talking about light medium duty or
10	are we talking about all trucks?
11	Q Medium duty, light medium duty trucks International
12	Harvester, for example.
13	A Their fuel system went through the cab, in the
14	cab.
15	Q They didn't have a tank in the cab.
16	A They had the filler system in the cab.
17	Q But the tank was outside the cab.
18	A The tank was outside and the filler connections
19	went through the cab, yes.
20	Q And where in the International Harvester 1966
21	or 1965 odel was the filler tube located?
22	A I believe it was located on the left side
23	Q The driver's side?
24	A Yes, and it went wait a minute. You said
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International Harvester.

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A Oh, I believe it was on the right side. I got confused for a minute. And I believe it came from approximately where the General Motors location is, on the right side, though, opposite side of the truck, it went through and down through the cab, and there was a coupling there,

and it would be behind the step, I believe, of the truck.

and then they went into the tank, which was right below,

That's absolutely correct. But the coupling was below the cab, was it not?

No. I remember it being in the cab, sir.

I beg your pardon?

I remember the coupling being in the cab, the rubber coupling.

The rubber coupling is at the floor level, isn't it, or below floor level?

A No. I believe that there was first a filler neck coming from the outer part of the cab. That would be the part where you would insert gasoline into. And I believe there was a coupling right after that -- come to think of it, I think it was up here -- and then there was a verticle filler, continuation of the filler neck through the cab and through a grommet in the bottom of the floor of the cab and then into the tank. I can't identify exactly where

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Elwell - cross

in and about 1966 that were not uniformly manufacturing

have just about discussed all of them that I'm aware of,

Q Are you familiar with other truck manufacturers

A In the light medium duty field I believe we

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the coupling was, but there was one in there.

cabs with the tanks inside the cab?

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the International and then Dodge truck and then General Motors and Ford. That's all that comes to my mind right now were the principal suppliers.

Now, the fuel tank system -- when I speak of the fuel tank system, Mr. Elwell, I'm only talking about the gasoline tank and the filler neck and the filler neck assembly, which is Plaintiff's Exhibit 42, and the gas line from the sender gauge that is inside the cab -- none of those parts of the system require any maintenance to remain in good operating condition, do they?

A No.

Wait a minute. I'm sorry. I agree with you that those are not irregular scheduled maintenance item.

Q Is there any reason for you to draw a distinction between a regular maintenance item and the need for repair in order to remain in good working order? Is there any reason for your making that distinction?

A Yes.

Q All right. What was your reason?

A The electrical indication on your dashboard for full or empty includes a meter unit that is mounted on the tank, and it is an electrical device, and it is in the ring, which is where your suction pipe also comes out of. It is one compact unit.

That would, as a possibility, be malfunctioning and would need to be changed. And although it is not intended to be it, generally speaking, does and it is accessible and it is removable and it is replaceable. It is called a meter unit. It is a small electric device.

Q But does that meter unit appear in the tank that we have here?

- A Quite frankly -- I'm positive it does.
- Q Would you step down, please?

THE COURT: Mr. Elkind, may this be the last question?

MR. ELKIND: Very well.

- Q Will you just show the jury that part that might require maintenance?
- A This part here [indicating] is held into the tank with five screws, sheetmetal screws, and a gasket for sealing quality. If you take the five screws, then you can pull the whole unit out of the fuel tank and replace it, or

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	Elwell - cros-
	you can test it, you can bench test it, to find out, for instance, if it is malfunctioning.
	MR. ELKIND: Just one more question. May I finish?
	6 THE COURT
	THE COURT: All right.
8	Q Would the malfunction if any, assuming there is
9	direct the delivery system or the
10	A It would affect the
11	A It would affect the gauge reading.  Q But not the last
12	Q But not the delivery system?  A Not the delivery system?
13	the delivery system.
14	THE COURT: All right. We will take a recess
15	and resume at twelve o'clock.
	[Recess.]
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(Jury present.)

Q Mr. Elwell, you have told us that there is no required regular maintenance for the fuel tank or the filler neck assembly or for the center gauge. Does the same also apply to the fuel lines up to the point where they reach the carburetor?

A No.

Q And that is because the fuel lines are made of turned steel, very strong metal; is that correct?

MR. HAGAN: I object to the form of the question.

I'm not sure that he said the reason was because they were

made of steel. He just said there were periodic --

THE COURT: I don't understand. I thought the question was whether they did or did not need maintenance. I understood Mr. Elwell's answer to be that they did.

MR. ELKIND: That they did not.

THE COURT: Then I misunderstood.

Q You say the fuel lines does require maintenance?

A It is part of the regular maintenance that would be performed on the vehicle. The fuel line goes to the attachment for the filter into the carburetor and that filter is preparatory to entering the carburetor and could be changed and should be changed if it is clogged up, and to do that you would have to loosen that fitting at the fuel

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2	line there so that you can get the filter out so it would
3	become part of it; it would become involved in the changing
4	of the filter.
5	Q So that from that part of the truck wherein the
6	fuel goes into the gasoline tank, through the little device
7	that I think you called is that the center gauge?
8	A I called it the meter unit.
9	Q The meter unit.
10	A Or center unit. There seems to be two terms that
11	are more or less commonly used.
12	Q Let's use the center unit.
13	A Okay.
14	Q Through the center unit and down through the gas
15	line that runs in a vertical position in the cab from the
16	center unit to underneath the cab, and then the fuel line
17	that extends underneath the frame to the point where it
18	enters the engine block or it engers the engine area
19	A The fuel pump is there.
20	Q The fuel pump. Up to that point there is no
21	prescribed regular maintenance necessary in order to keep
22	those parts of the vehicle functional and properly perform-
23	ing their necessary function?
24	A That is correct.
25	Q Right?

That is correct.

Q If you have a sudden drop showing up on the fuel gauge, there could be two possibilities that could account for that, one would be a leak in the fuel system and the other could be some difficulty in the gauge itself; is that correct?

A No, not as a normal mode of a unit. I believe I understand your question to be if the meter unit was electrical malfunctioning so it was no longer working, would that indicate low fuel, and the answer is no, the needle usually goes to full and past full because it is an open circuit in the meter unit and you'd get an overflow indication.

Q Could it also drop down to empty, depending upon where the defect was, or could it also start to flutter?

A Whether it could start to flutter? Yes, I am aware on occasion it would flutter. The normal movement of the truck might cause just a very small, very small -- but, yes, it could flutter, but it fluctuates in a rather random pattern until it finally goes to full or overflow. Actually it pins the meter in the overflow. The meter is not in the circuit any longer.

Q If you assume that Mr. Brennan was telling the truth when he said that the fuel gauge was dropping, does

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A No.

Q Ordinarily in making these trucks -- I assume you are familiar with maintenance procedures, sir -- if you have a complaint with respect to a dropping fuel gauge, which do you consider the more likely probability, that there might be a leak in the fuel line or a difficulty with the gauge?

Elwell - Cross

A I would consider the probability would be more that there was a leak in the fuel system.

Q And that is even so in the design of the fuel system if the type of materials are used so that no such maintenance is required?

MR. HAGAN: Objection. I don't believe he said no maintenance is required.

MR. ELKIND: I will withdraw the question. I will rephrase it.

Q And you would have that opinion even though the design of the fuel delivery system from the point where the gasoline comes in to the point where it reaches the fuel pump is of the type and a durability that no maintenance is required?

Q Let me go back to my question and ask it again:
The reason why there is no regular maintenance necessary
for those parts of the fuel delivery system is that they are
designed to be constructed in such a manner that they will

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remain, their integrity and usability will remain functional throughout the expected life of the truck?

A I believe you added also normal usage, which obviously, if the truck has an accident that would damage them. Then you would have to consider their integrity at that point barring an accident.

Q Barring an accident.

A Barring an accident and barring unusual circumstances that trucks may get into, yes, that is right.

Now, let me go back in my questioning to that part of your testimony in which you pointed out to me that the outside gasoline tanks are usually chosen at the option of the purchaser so that a larger fuel tank capacity can be used than the 18 gallons that is normal in this model.

Do you remember that?

A I remember that discussion.

Q What size gallonage, how many gallons did you suggest were available for outside tanks? Did you say 50 gallons?

A I was reaching back in my -- my recollection wasfirst of all, the tanks are not manufactured by General
Motors. These tanks range in size from 35 gallons to, I
believe, 75 gallons. I am trying to reach back again into
1966 and 1949, in that era.

I would say that you had, probably, the capability of ordering from 35 to 75 per tank, so that putting two on the vehicle would be about 70 to 150 gallon range on the truck. That is a highway truck.

- Ω Are you talking about a single tank? We are talking about 35 to 75 gallons in a tank?
- A Yes, I believe --
  - O The outside tank?
- A I believe those were the sizes that were available; back in 1966.
- Q If an outside tank with 35 to 75 gallons is damaged it stands to reason, does it not, that the potential amount of gasoline that would come out from such an incident would be far greater than the amount that would come out from an 18-gallon tank? That is obvious. Do you agree with that?
- A By potential you mean what, the energy release period?
- Q The fuel loss, the potential amount of gasoline that would come out of the tank would be in accordance with the amounts that is in it?
  - A Yes.
- Q And you spoke of the leaking of the gas tank as representing a potential threat to the safety of the people

two clamps to the jury that one of these clamps had to be

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And you indicated to the jury when you showed those

locsened in order to remove the rubber hose from the op of the gasoline tank; right?

A Yes.

And you don't know that that is so, though, that you made that supposition? That was a supposition on your part?

A Well, it is loose and it wasn't loose when it was in the truck.

Q How do you know?

A Because the impression on the rubber is -- you can't get this -- notice that this clamp has a circular depression here.

Q Yes.

A Then it is about an inch wide. Whe I put the clamp on it I can mate exactly the pattern of the clamp, where it was, and this clamp could sit there for years and never mate that mark because the production has tightened it and forced an enduring impression.

Q Would you know whether or not there is any way in normal wear and tear that the clamp, once tightened with sufficient force to produce a mark on the rubber of the type that you have just pointed out for me, could become looseded?

A Well, the design of this clamp includes a thread

and design is essentially a self-locking device one. It is tightened and it has resistance, as you can see even in the loosened condition, I can't turn this, so once this self-locking condition is set up by the threads in the bolt and nut -- there is a trap nut that you can see here -- then this clamp is not going to vibrate and back out.

The second aspect of that is that this is inside
the cab where the environment is habitable at least. In
other words, you and I are breathing the air that this would
entail. This does not have sunlight beating down on it to
cause it to deteriorate in any way. It is not involved in
environmental exposures that would be aggressive to the
rubber and, as you see here, after nine years the rubber is
virtually as good as it ever was and it is in very good
shape.

Det me ask you some questions about Exhibit 42 that you now have in your hand. Except for the point that is marked with yellow out to the end --

A Yes.

Q -- of the filler tube, the balance of Exhibit 42 is actually concealed in an area between the outer wall of the cab and the inner wall of the cab; that is correct, isn't it?

A Well, the word concealed implies that it is hidden completely from accessibility.

Q Let me be a little more explicit. The only way you can actually see it is to put your head down in the corner and look up into an opening; that is correct, isn't it?

A Yes, the principle of motion that you have used is essentially what is required to see it.

(Continued on Page 720)

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Elwell - cross

Q So that I'm at eye level with the filler tube and looking across the cab with the filler tube at eye level I can't see it. I have to bend down in order to see it?

A My recollection is that you can see the bottom clamp but not the top clamp. That I recall. If you were standing across the cab, standing on the ground, I believe you can see the bottom clamp.

Q Let me show you Plaintiff's Exhibit 19 for identification and see if looking at that picture doesn't refresh your recollection that you cannot see it at eye level.

A The camera lens was above eye level toward the filler neck, but --

Q Let me show you Plaintiff's Exhibit 18 in evidence.
That shows the neck that projects from the gasoline tank,
does it not?

A Yes.

Q Can you see the clamp or any part on Plaintiff's Exhibit 42?

A It is fuzzy back here. I'm not certain about that. From the angle of the camera, no, I'd say no.

Q Do you know whether or not there is any way that these screws can be loosened manually by hand or with a screw driver or a wrench from inside the cab?

A I know they can be. I know this one can be.

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- Q How would you manually loosen this screw? How would you go about doing it?
  - A Well, the screw, as you say --
  - O The clamp.

A The clamp, yes. The screw-I'll accept that -is slotted for a screwdriver, but it is also made in a hex
configuration and this takes a wrench and so when it is
put into the truck -- I'll line it up on the hose this way -it was sitting like this and the workman would get under
here with a wrench. It is a s/16 wrench. He would just
simply loosen this clamp this way. He does not have to be
in the position of the camera, of course. Now he has moved
either the seat back or the most customary way would be to
take the seat out. There are eight bolts that are required
to be loosened to move th seat out.

Now, the workman has the fuel tank and the filler. He'll take the wrench and loosen this once. That clamp is slid down or loose -- it doesn't matter. Then you loosen the fuel tank straps that are retaining the tank in the cab and you can then hold the tank out leaving this part above [indicating.] Once the tank now is out of the cab, then you move it in this manner and pull it out of the rubber escutcheon that is around here normally and now you have the whole system in your hands to work on.

1	3 mcsr Elwell - cross 722
2	Q Do you know, sir, whether prior to 1966 General
3	Motors was aware of a tendency of these filler tube
4	assemblies to become loose in operation?
5	A Are you talking about this truck, the number
6	Q Whatever the exhibit number is. It is Exhibit
7	No. 42.
8	A No.
9	Q No such information?
0	A No such information that we were aware of that
1	they were loosening.
2	MR. HAGAN: May we approach the side bar, please
3	THE COURT: No, I don't think so. I don't
4	see any reason for approaching the side bar yet.
5	Q I show you Plaintiff's Exhibit 51 for identifi-
.6	cation and I ask you to look at it and particularly, Mr.
7	Elwell, I would ask you to look at the area between Lines
8	25 and 30 and ask you whether or not that refreshes your
9	recollection as to whether or not General Motors had informa-
20	tion that leakages may occur at either or both of the two
21	joints necessarily formed.
23	A In the context of this
24	Q Just answer my question.
4	MR. HAGAN: May we approach the side bar?

THE COURT: I think what I would prefer to do

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at the present time is excuse the jury and let me find out where this is going. I want the jury to be excused for a short while.

[The jury left the courtroom.]

MR. HAGAN: Your Honor, we are now getting into
the area that we earlier discussed of the Cole patent and
the statement in the patent application by the inventor
as to why the patent was a superior device that we had
discussed with your Honor at the beginning of this case and --

THE COURT: I understand where we are. I understand precisely where we are with regard to that.

MR. HAGAN: Even the framing of the last question

-- if the Reporter would read it back, the framing of the

question incorporates the precise language that is contained

in a document not in evidence and he hands it to the witness.

The whole atmosphere created by using the exact language

of the patent, which your Honor had earlier ruled could not

be used here, that is, the statement of an inventor that

a certain joint might tend to leak or there might be leakage

is not probative in this case.

and I am not sure of this because I don't know where Mr.

Elkind is going to go, and that is the reason I dismissed

the jury -- I am going to allow Mr. Elkind to question the

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witness and then I will find out on the basis of the cost tions he asks in the absence of the jury where he is going and then I am going to make a determination as to whether it is proper.

MR. HAGAN: I think he already asked whether that document refreshed his recollection, that they were aware of leaks in 1966.

THE COURT: All right, what is the next question?

MR. ELKIND: I don't know what the answer is

yet.

BY MR. ELKIND:

THE WITNESS: May I have it one time more?

VOIR DIRE EXAMINATION

Q Does it refresh your recollection as to whether or not General Motors had noticed before 1966 that leakages may occur at either or both of the joints shown on Plaintiff's Exhibit 42?

A No, this does not -- I said that I was not aware that General Motors was aware that those were leaking.

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1	l jgsr Elwell 725
2	Q Are you familiar with Plaintiff's Exhibit 51?
3	A I'm familiar with it, yes.
4	Q And you are familiar with the fact that this is
5	a patent that was issued to Mr. Cole while he was an employee
6	of General Motors and that it was assigned to General Motors
7	sometime prior to 1957?
8	A This was a patent by Edward N. Cole and Edward
9	J. Naudzius and they were assignors to General Motors
10	Corporation, yes.
11	Q And Mr. Cole at that time was a design engineer
12	with General Motors, was he not, and altimately became
13	president?
14	A Yes. I don't know exactly at his position at
15	that time was, but he was with General Motors.
16	Q He is considered the designer of the Corvair?
17	MR. HAGAN: Objection to the form of that
18	question.
19	MR. ELKIND: I am just trying to identify the man
20	A If you want to identify the man, Mr. Cole was
21	the past president, and most recent past president of the
22	General Motors Corporation.
23	Q But do you know what role he played in the General
24	Motors hierarchy or what his position was in 1957, when this

patent was issued to General Motors?

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A He was in an engineering management capacity, but I don t know what his title was.

Q And is it correct, would I be correct in assuming. that if Mr. Cole said that leakages may occur at either or both of the two joints necessarily formed, that he had a sound, rational basis for making that statement? It wasn't

MR. HAGAN: Objection to the question. How is this witness supposed to know what the basis was in somebody's mind in 1957 for making that statement?

THE COURT: I agree. But I'm going to let him ask the question. There is no jury here.

A [continuing] In order to understand what Mr. Cole had in his mind at that time it is impossible for me, but the context of the patent itself would suggest what might have been in his mind.

Q What was in his mind was to eliminate those joints.

MR. HAGAN: Objection now. The witness is trying to answer the question. Now you are leading him.

MR. ELKIND: I am on cross-examination.

THE COURT: He is not leading him now, Mr. Hagan. He is supplying him with the answer, which is improper.

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MR. HAGAN: Why don't we just let Mr. Elwell explain his answer?

Q Am I not correct, sir, that the purpose of making this statement about the potential leakage in either or both of the two joints was to show the superiority of a filler tube assembly which had no joints?

MR. HAGAN: Objection. The witness cannot know what the purpose of his statement was almost twenty years ago in a patent application.

THE COURT: All right. You may answer, if you want to, There is no jury here.

A I cannot read this into it as you would suggest, that that's a reason, a flat statement, a one-sentence statement. I don't exactly know why they made that statement.

- Q Mr. Cole made it with the other fellow, right?
- A Both Cole and Naudzius made it.
- Q Yes. Mr. Cole was a reliable man, an honorable man?

MR. HAGAN: Objection, your Honor.

THE COURT: We don't seem to be getting anywhere,

Mr. Elkind, at least where I think you would have to go if

this is to be admissible. You don't seem to be even approaching that as far as I'm concerned.

Elkind, that not only is there some possibility of something

happening, anything can occur, but I think you would have

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	Q I'll ask another question. Do I understand your
	testimony on direct and up to this point on cross-examination
	to be that it is impossible for a leak to develop in the
, !!	filler tube assembly?
	A I didn't say it was impossible.

- 0 It is possible?
- It would be possible.
- It could have happened in this particular filler tube assembly in Truck No. 1? Is that a possibility?
  - You are pointing towards this one right here?
  - No, no.
  - That one didn't leak.
  - No. No. 2. It is possible; you didn't see it. Q
  - It is a possibility, but not in this accident. A
- But it is a possibility that it may have occurred, even though in your opinion it may have had nothing to do with the accident?

MR. HAGAN: For the record, I object to these questions. Your Honor, what is possible in this world is -you know, I don't see where that is getting us.

THE COURT: I agree. I don't think that is getting us anywhere. You would have to show, I think, Mr. Elkind, that not only is there some possibility of something happening, anything can occur, but I think you would have

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to show that it is more likely than not that it would occur.

And I think that the testimony thus far that we've gotten

has indicated that more likely than not it would not occur.

MR. ELKIND: Well, this is something for the jury to weigh, and they are entitled to receive whatever evidence will help them on this.

THE COURT: Now we are on that patent? You haven't made any basis for admitting that at all. You haven't even approached the point that I could possibly admit that before the jury. If that's all you are going to do, then I'll call the jury back and the matter will to excluded.

It is on the record. You haven't made any possible basis that I can see to demonstrate that that is a matter that goes before the jury or that General Motors had any notice that this design was defective in the respects that you are attempting to show.

MR. ELKIND: Your Honor, it appears on the face of the exhibit.

THE COURT. We had this discussion before, in which you indicated to me that Mr. Cole, whose position we don't know, who was co-author of or co-inventor of a patent and in that patent he and his co-inventor indicate that their patent is a superior product for various reasons--

what you are attempting to do is to impute that as being notice and knowledge to General Motors, and I don't believe you can do that.

show that it is so. It could be puffing. There is no showing of what tests were made on these products to demonstrate that this was or was not so. There is no evidence that you've introduced to show other than the statement, I think about a sentence or so of Professor Weinstein, that where this tank was located was in a dangerous position.

I don't believe that you've shown me anything that would justify my admitting that.

Get the jury back.

MR. ELKIND: If your Honor please, if he denies that the joints on the filler tube assembly could have become loosened and developed a leakage, if he denies that, would your Honor then agree with me that for the purpose of impeaching his statement I can show him that there is a direct statement by General Motors to the contrary?

patent. I don't have any way of knowing -- sure, they
bought the patent -- how the Patent Office operates, whether
there were tests made in regard to this and so forth.

The fact that they bought the patent, as far

as I'm concerned, doesn't mean anything at all. You don't

even know and Mr. Elwell doesn't know the position of this

man. Did he have a position of authority? The fact that

they bought the patent and now he is president, maybe that

means that in 1957 he was a genius in the automobile

industry. But I den't know that and I just think --

MR. ELKIND: But there is evidence by Mr. Elwell, and your Honor may have missed it, as to what Mr. Cole's position was at the time in 1857.

THE COURT: He said he didn't know what his position was.

MR. ELKIND: He said he was in the design enginerring department.

THE WITNESS: No. I said in an engineering and management capacity.

THE COURT: In any event, I don't believe, I don't think that what you are doing, what you are attempting to do with the use of this -- I just don't think I can allow it. I don't think it is right.

MR. ELKIND: In connection with my exception to your Honor's exclusion of this evidence, may I at this point in the record -- and I ha' mentioned this earlier, before we opened to the jury, that I wish to take exception to your Honor's refusal to permit me to examine Mr. Cole as a party

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before trial in this case --

Obviously, of course, you have a right to object, as I gather you objected before. As I told you the other day, there must have been some good reason at the time as to why I did not allow that. I can't answer that because that is too far down, but obviously you may put it on the record.

MR. ELKIND: What use may I make of this document?

MR. HAGAN: I just ask that there be no more walking in front of the jury and holding that --

far as I'm concerned. I had allowed this examination rather than have a side bar conference because I wanted to determine in my own mind whether you can make any proper use of it.

I don't think that you have. So I think that your use of it is void.

MR. ELKIND: Before the jury is brought in, to round out the record --

THE COURT: Sure.

MR. ELKIND: May I read from the document?

It is United States Paten Office --

MR. HAGAN: The last time we had this argument -THE COURT: Why don't you mark it for identif i-

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2	cation?
3	MR. ELKIND: It has been marked, your Honor.
4	THE COURT: and refer to it so we are sure
5	what we are talking about. And if there is any purpose or
6	need for it, it will be available to the Court of Appeals on
7	appeal.
8	MR. ELKIND: All right.
9	THE COURT: So we are talking about what exhibit
10	number?
.11	MR. ELKIND: May I just read into the record
12	two sentences from the patent?
13	THE COURT: All right.
14	MR. ELKIND: Those two sentences are as follows
15	THE COURT: Give the exhibit number.
16	MR. ELKIND: I am now reading from Plaintiff's
17	Exhibit 51 for identification.
18	MR. HAGAN: I submit that marking an exhibit for
19	identification that has not been admitted into evidence and
20	then reading it into evidence is improper.
21	MR. ELKIND: I am just reading it into the
22	record.
23	MR. HAGAN: Excuse me. The exhibit has been
24	marked for identification. It will be available to any
25	Appellate Court.

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THE COURT: I know. But there is no jury, and what he is now doing is in effect making an offer of proof, and I think that is proper.

MR. ELKIND: It is as follows:

"In place of making the filler tube and tank
as an integral unit, it has sometimes been the practice to
make those parts separately and ultimately to connect them
in a vehicle by means of a flexible conduit and suitable
clamps. This latter expedient is not entirely satisfactory,
as leakages may occur at either or both of the two joints
necessarily formed."

THE COURT: Mr. Hagan, I suppose what I could do if you desire to, is to allow you to protect the record as well and make whatever statement you want to make.

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MR. ELKIND: Mr. Hagan said that I handed it to the jury, your Honor, and that of course is not correct.

All I did was hand it to the witness.

MR. HAGAN: I did not say you handed it to the jury. I said you were walking around holding it in front of the jury and I said I would ask, if this document cannot be used, as I believe your Honor has indicated, that it not be walked around with and held in front of the jury.

That's all I am asking.

THE COURT: We finished with the document and Mr. Elkind understands that.

MR. HAGAN: All right.

THE COURT: If you have any statement you want to make on the record at this point, you may.

MR. HAGAN: I object to the reading into the record of two sentences from an exhibit that has simply been marked for identification.

THE COURT: All right.

(Jury present.)

CROSS-EXAMINATION (Continued)

BY MR. ELKIND:

Q Sir, do you agree with me that the integrity of the fuel tank system, its ability to stand up and not leak, is an important factor which must be taken into consideration

in determining whether or not to locate a gasoline tank and a filler tube within the body of the cab occupied by human beings?

A Yes, I would agree to that.

Q Now, do you agree or disagree that there is a possibility that a leak or leakages can occur at either or both joints of the filler tube assembly of the tank that is represented by Plaintiff's Exhibit 42?

A Well, it would be ridiculous to say, if you consider all possibilities of all things, that that could never, never leak.

Ω So it does exist as a possibility.

A As remote as it is, that has to be considered a possibility.

Q And doesn't even the remote possibility that a leak could occur, leakage could occur at either or both of these joints suggest to you, as one who is interested in the design of fuel systems, that a safer system, from the standpoint of people as opposed to gas tanks, would be with the gasoline tank outside the cab?

A No, I don't believe I would agree with that.

Q Is it your position that the advantages of protecting the gasoline tank from damage from the environment and
so forth is more important than the human beings that might

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2	possibly, even remotely, be damaged as a result of leakage
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4	MR. HAGAN: Objection, your Honor. That is not
5	what the witness stated.
6	MR. ELKIND: I am asking him.
7	THE COURT: I think that you asked that question
8	about half an hour ago and I think it was answered. That
9	is my recollection, that you went over Mr. Elwell's testi-
10	mony in regard to the placement of the tanks.
11	MR. ELHIND: Your Honor, I am following an out-
12	line and I have just come along in m outline to that point.
13	THE COURT: My recollection is you asked him the
14	question before. I may be wrong, but go ahead, you may
15	answer it.
16	A It is the collective nature of the whole problem
17	that you put before me that I have to explain.
18	The engineering material and the design and the
19	capability to perform a vapor-liquid seal both in the
20	manufacture of the fuel tank and the vapor-liquid seal both
21	in the manufacture of the fuel tank and the vapor-liqui
22	seal of the coupling on the upper and lower filler neck, the
23	engineering techniques that were devised or that were
24	acceptable at the time in the connections within the fuel

line and all that make it so highly unlikely that a leak

would occur, number one, that it seems to me that the advantage of the more frequent exposure of the tank, now, to very great fuel leakage is a compelling reason for the engineer to consider that location in the cab itself.

And we did use good engineering materials, we did use good and, it is obvious from the one that you have there, enduring materials, we did have good workmanship, and we had a good design, in my opinion.

Now, aside from the remote risk of a possible leakage from the filler tube assembly joints, are there other risks that you are aware of that follow from having the gasoline tank in the cab with the passengers, in terms now of the possibility of gasoline vapors being in the cab?

A I'm not quite sure what you mean by "risks."

Are there other foreseeable incidents that might create a

leakage of gasoline?

Well, not a leakage. Forget about a leakage. Are there other risks of having a flammable mixture of gasoline and air present in the cab of the truck which follow from the design decision to place the tank in the cab of the truck?

A If I understand you correctly, what you are saying is, given the tank is in the cab but it doesn't leak at all?

Q Right.

Perhaps the best way to look at it is to look at Sketch A, which is Plaintiff's Exhibit 50, and let's start with an agreement on the proposition that when a vehicle is being filled with gasoline at a filling station that the most permanent and probably the only source of gasoline vapors is from the nozzle of the gasoline pump.

Can we agree on that?

- Gasoline vapors from the nozzle of the pump?
- Of the pump, when it is pumping gas.

Well, it wouldn't be vapors. It is liquid gasoline that it is pumping.

Maybe I misunderstood you. I thought you said it is pumping vapors.

When you are pumping gasoline out of the nozzle of a gasoline tank, vapors are coming out, are they not?

Of the tank.

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[The jury left the courtroom.]

THE COURT: In order to give me some guidance on a decision I have to make, I would like for you to give me some information, Mr. Elwell.

When was the fuel tank in trucks of this kind moved from the cab to wherever they are?

THE WITNESS: For General Motors and Ford, 1973 was the first year that it was not in the medium and light duty. 1973 for Ford and General Motors and 1974 for Chrysler Corporation Dodge Pickup in medium duty trucks.

THE COURT: Is there any dispute about those dates, Mr. Elkind?

MR. ELKIND: I would like a moment to check, your Honor. I had an idea that it was earlier, but I could be wrong.

THE COURT: When you say "light duty medium trucks," you are talking about the kind of trucks that are

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Now, roughly, that would mean, would it not, that as the truck was parked at the Esso station to get gasoline, the wind was blowing in such a direction as to blow the fumes, or the vapors that you described that were coming out of the filler tube, toward the open window, or if the door was open, the open door?

A Essentially yes. There is a tangential velocity created by the vapor itself, and what I'm saying is that the vapor wants to go to the ground. It is four times heavier than air, so it creates its own movement with respect to the window.

The wind will want to diffuse it and blow it apart, but at the same time it would want to move that diffused fuel toward the front of the cab and toward -- from left to right in the cab, as I understand the way it was sitting.

Q So that if at any time in your analysis you came to the conclusion that there was a flammable mixture of gasoline vapors in sir present in that cab,

I would look --

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Q Did you or did you not?

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A Well, when I saw the physical evidence, I have the conclusion that I still have to this day. To then consider all the possibilities that existed, that might have

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been used by someone trying to explain this fire, but it is so totally inconsistent that I really did not give it that much merit.

O Did you consider the possibility that there were two fires in the truck, one in the body of the cab and one in the engine?

- A Well, I guess really, to be accurate, there was
- Q Did you consider that? Just yes or no.
- A Well, there were more than two fires. Okay.
- Q Now, when did you begin your in restigation of the fire, Mr. Elwell?

A It would be the latter part of June, July, right in there, of 1972 would be the first indication that I had had that there was an accident and a claim against General Motors.

Q And that was after the commencement of this lawsuit?

A Yes, sir.

Q What materials did you get to work with originally in conducting your investigation?

A I believe at that time there were certain -the Weehauken Fire Department report, I think the Jersey
City Fire Department report, and perhaps the police response report or a fire response report. And I believe at that

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Right.

A I looked at the injury between the three occupants, the damage in the truck -- in the cab which was in the photographs already, the statement of Chief Lennon --

You had that before you.

Yes, I had that before me. I believe that's it.

Okay. Now, based on those additional materials, will you tell me the final conclusion that you reached?

That this was an engine compartment fire initiated by the loss of gasoline and the vaporization of that lost gasoline was ignited by the distributor. The tremondous conflagration that was created now in this burning ergine compartment allowed flames to come into the cab underneath the dash, where the levers are located that control the dump mechanism, the levers are right underneath the dash and right of center of the vehicle.

You've already explained that.

MR. HAGAN: Wait a minute. I would ask that Mr. Elkind stop interrupting the witness in his answer.

THE COURT: All right.

MR. ELKIND: I just wanted to confine him to --MR. HAGAN: You shouldn't interrupt the witness in the middle of an answer.

MR. ELKIND: If he moves away from the explana-

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MR. HAGAN: Then you can move to strike when

THE COURT: Oh, come on, gentlemen. Let's proceed with this case.

All right, Mr. Elwell.

The fire now that was allowed to enter through the openings for the contr . levers involved the seat and the dash area, and the heat continued up and out in this cab until it involved, in a direction up into here, coming out of the back window, and ignited the materials that are in the truck, dump body, and ultimately, as we see it, in rather a line that I am describing here on this photograph, letter D, we can see the origin was someplace in the engine compartment here [indicating], and it is uphill all the way, up and out and out the back.

Q All right. Nov, let's start with the origin of the fire in the engine.

A Yes.

Would you say there was a loss of gasoline? Did you determine where the gasoline loss came from, the point in the gasoline delivery system?

I believe that it was most probably lost at this junction of the fuel line entering the filter unit,

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Elwell - cross

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which is attached to the side of the carburetor. Someplace in that vicinity is my most probable source of the gasoline.

Q And you make that assumption on the basis of the photographs showing that as a badly damaged, badly burned area?

A Yes. And the temperatures that would be required in that area to damage them.

Q Now, did you take into account, in reaching the conclusion that there was a loss of gas, the testimony of Mr. Brennan that the gasoline tank had been dropping --

A The fuel gauge had been dropping. I took that into account, definitely.

O Did you consider the possibility that he was not telling the truth when he said that the gasoline gauge was dropping or that he was just covering up because, as the Mayor testified, he was required to get gasoline every morning and he hadn't gotten it on the morning of the fire?

A I didn't check his honesty, if that's what you mean.

Q You just accepted his word at face value.

MR. HAGAN: I object to the form of the question,
your Honor. Plaintiff has put on Mr. --

THE COURT: No, no, no, Mr. Hagan. Sit down. You may answer.

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O So that when you go to turn the switch and you get this initial spark, there is a spark first in the ignition, right, in the ignition switch?

A We've got to be very precise about exactly what order you want me to tell you a spark occurs.

All right. Let me rephrase the question.

You have the distributor, which, by your statement, is in a housing and its function is to spark, create a spark, right? Is that correct?

A Yes.

And your testimony here is that when you turn the ignition key you get a spark.

In the distributor and the starter and the starter solenoid, that area, yes.

And the spark is in the housing of the distributor.

Yes.

Which is designed to house and keep sparks inside of them; that's the purpose of the housing of the distributor.

No. It happens that as a result of the design of the distributor and the sensitiveness of the instrument it is protected from the elements and also because of its nature it has to find a way to get a spark -- as a rotor goes around, it has to find a way to get a spark to six different wires. at precisely the time that the engine needs it.

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This creates a housing, or a cap. It just happens by design that it is enclosed because environmentally it just cannot endure moisture to a great degree. It cannot be sprayed. It cannot stand dues and dirt to get to it.

And it also needs to perform its function, and that is go go around a circle and find the six spark plugs.

Q But for whatever reason it is housed and the sparks are confined, the sparks in the distributor are confined in the interior of the distributor.

A Yes.

Q They are not permitted, not even the first spark is permitted, to flash out from the distributor, because of the existence of that physical housing, isn't that correct?

A That is essentially right.

O Now you tell us that when the key is turned, by your theory there is a spark that comes out of the housing.

A No, I didn't say that, sir. I said it ignited --

Q It has to contact something, does it not?

A Contacted the vapor in the case of this truck here.

The vapor -- what you are overlooking is that the distributor is vented. It isn't totally enclosed or hermetically scaled. It has to be vented because the operation of the distributor creating sparks inside will cause a temperature rise.

In order to get rid of that heat, there is a

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natural convection of air in and out of the distributor. Now, when the engine was running and the fan was turning, the distributor was breathing, if you will. That is the best way I can describe it is that it actually would allow air in and air out to cool itself.

Elwell-cross

But the air flow was pushing it down and rearward as far as escaping gasoline vapors. When the engine was stopped, however, the gasoline vapors now that were still vaporizing off the gasolien that hadn't disappeared yet wore able to find their way inside the distributor through the vented portion.

Then, when a spark occurs, if they are in the proper combustion limits, it will ignite. Then the flame inside of the distribut usually lifts the cap right off a portion, and now the flame can come out into the atmosphere, which has additional vapor, and then in the pop and whoosh type fashion you will get the engine compartment on fire with the gasoline that has already escaped.

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hoping.

Elwell - cross

Q What is your opinion, sir, was the length of time that elapsed from the moment that the ignition key was turned until the time that a flame entered into the passenger' compartment?

A The best I can say is that it sure didn't take long. It would have been a reasonably close time of a second or less.

Q In less than a second from the time that the distributor caught fire there was flame inside the cab of the truck?

A Well, there was a lot of gasoline lost from that truck. Apparently it started with about nine gallons of gasoline.

Q Where did you get that information?

A I believe it was half a tank and half of 18 is

9, so just giving it a rough estimate, we started apparently

with nine gallons of gas and by the time -- I believe the

statement that Mr. Brennan made was the he couldn't get

from the road to the dump and back, he couldn't get to the

dump and out, so that meant that he was very low on gasoline

and that means that he must have in two hours probably used

no more than one to two gallons of gasoline in the six

miles or so that was traveled, and that means he must have

lost about four, five, six gallons of gasoline. A portion

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of that gasoline would have been in the engine transmission area behind the distributor as it flowed downhill on top or the power take-off unit and the top of the transmission and when the distributor ignited the gasoline, and with the capability of the gasoline to spread that the velocity of between 12 and 25 feet per second, with the roaring inferno that was created undermeath the engine compartment that came in those levers, the control levers for the dump per tion of the truck, that are directly above the area very quickly.

Elwell - cross

A Well, that was just a figure that I used. I am trying to give you a feel for it. The sequence would be very rapid, perhaps a second.

Q Do you recall reading this part of Mr. Brennan's testimony beginning at Page 20, Line 19 --

MR. HAGAN: This is his deposition or testimony?
MR. ELKIND: HIs deposition.

Q "Q Did you notice prior to the fire when you were driving the vehicle upon the County road any rapid decline in the gas gauge?

No, just that I know that we were running short of gas and I did not want to get stuck at Secaucus.

There is no gas station out that way."

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2	Weinstein's	testimony.	
3		I will be glad to locate it precisely.	
4		MR. HAGAN: There is nothing on Page 421.	
5		THE COURT: No, nothing on Page 421.	
ü		MR. ELKIND: May I have a moment to find	that
7	for your Hor	nor?	
8		MR. HAGAN: I ask that we move on, your H	onor,
9	an that he	read the next questions that your Honor su	ggnate
0	he read.		
1		THE COURT: Yes, do that.	
2	Q	I will go back in order to get continuity.	
13		"Q You said you first saw flames in fro	int of
14	your face"		
15		MR. HAGAN: Now he is reading the whole t	hing
16	again. We	are asking him to continue and read the las	t
17	two questio	ns.	
18		MR. ELKIND: I want to do that, sir, but	I
19	want to get	the continuity.	
20		"Q They were not inside the cab then?	
21		"A Just coming out from the bottom, from	om the
22	dashboard.		

Underneath where you were seated; is that

"A No, where the key is. That is the dash-

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right

A In front of the window.

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- Q How did you interpret that?
- A It sounds pretty clear to me that he saw it in front of the windshield between the hood and the windshield

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and outside the cab.

Q Between the hood and the windshield which means the area that appears in Exhibit 50 as a series of vertical lines, short vertical lines?

A Well, I can't be as precise as that to say that it was there. He said in front of the windshield, and those louvers happen to be in the middle portion of the vehicle in front of the windshield, but the hood extends completely across and wraps around the sides, as the sketch there would indicate.

Q The louvers actually extend across the center of the vehicle, would they not?

A Not from side to side. They are located more in the center of the vehicle.

Q And those louvers, if you go right under those louvers, you are on the passenger side of the fire wall, are you not?

A No.

Q Is this diagram incorrect, then?

A No, you are on top -- if you want to call it the fire wall. There is a plenum chamber there, sir --

Q What kind of chamber?

A plenum chamber. The chamber is external to the cab. It does distribute air from side -- one side receives it to the heater intake and it also pulls it into

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the air vent, and the other end discharges it on the left side, the summer vent. It is a tube which extends outside the passenger's compartment and goes across the cowel of the cab. It is in front of the windshield for a very good reason, because it forms a positive pressure to cause flow to help the heater and the summer vents. In no way is that inside the cab.

Elwell - cross

Q The air that goes in through that vent, does that go into the engine or does it go into the air distribution system for the ventilation in the cab?

A It depends on the position of the air intakes that control that. If you have them all closed, then there will be little if any air that can get into the cab. If you have them all open you'll get the maximum amount: of flow, providing you have the windows all rolled down.

On a day in the summer there is a reasonable probability that the vents would be open to provide ventilation for the people in the cab; isn't that correct?

A There is some confusion about whether or not the right window was down or up, I think, but the left one was certainly down. I think we can all agree on that.

I don't know about the right window.

Q Does that ventilation have anything to do with ventilating the engine?

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And if any flames then were coming through those ventilators they could not have been the flames that you think were burning under the engine?

Well, there is a puzzling part about this case that I haven't been able to really completely analyze.

No. 1, I have always believed that the flames that he saw came between or aft of the hood or in front of the windshield without regard -- and I don't ever recall

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doesn't suggest that the flames were coming from the grill. He was asked, and he gave a completely positive answer about . where he first saw the flames, and then he was asked again

MR. HAGAN: I would ask that Mr. Elkind allow the witness to finish his answer to a question before he

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interrupts him with another.

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Then he was asked clearly, "Where did you first see the flames?" Or, "Did you first see the flames inside the cab"? And I believe his answer was, "No," or in the contrary, Did you see it first outside the contrary, And his answer was j'st a plain "yes." I can't remember which it was. At that time, then, it seemed to be that the conclusion about where the key was and where the dash was had all been behind them and I understand it to be that they were at that instant communicating very clearly.

Keeping the grill in mind, now the possibility which you did not consider before, may I rea , --

I didn't say that.

MR. HAGAN: I object to the form of that question.

You said you never did consider the grill as a place from which the flames were coming in your analysis.

No, I said that there is a confusing point about the photographs which would lead even one -- if one assumption is right, would lead one to explain why they came out of the grill. But I am really not able to say for certain that they would have come out of the grill. If you would like me to explain that, I will.

I will let your counsel ask you that question.

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THE COURT: And your question is, I gather, would it have spread to the cab had there been no vapor.

Is that what you want to know?

MR. ELKIND: That is one way of approaching it, your Honor.

THE COURT: I thirk that is a fair question.

Do you understand it?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Let me rephrase the Judge's question.

A Thank you.

Assuming that the fire started under the hood, as you have theorized, would it have spread to the cab in the absence of a flammable mixture of gasoline vapor in the cab?

A Yes, it would have.

You testified on Friday that the bridge leading from the fire in the engine to the fire in the cab was through some slits, two slits in the floor of the cab which were directly over the transmission.

THE COURT: Did you say "bridge"?

MR. ELKIND: Bridge, yes.

Mr. HAGAN: Excuse me, your Honor. I wonder if
Mr. Elkind can stand back. My vision of the witness is

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top plate burning, how far up into the cab would the flames from the burning gasoline project by your theory?

A Number one, the difficulty that I have is you seem to isolate all of the gasoline and all of the pushing that we talked about, the fan, and the vapors and --

Q Well, the fan wasn't going. Can we agree on that?

A Well, but during the time the gasoline was lost, it would be my opinion that the gasoline would have been on an operating engine pushed rearward and found its way over the underside of the cab transmission area, the power takeout area, several others, so you are trying to isolate a six-by-eight or 48-inches of gasoline-produced flame.

And compare it with that, which is probably about one square inch, so right off that, you know, it is about 48 times greater.

Q Well, if this is the question I am asking you, and you can answer it without going through that explanation.

A Well, I can't give you an estimate of how high that --

You can't estimate how high in your opinion the flames were that came into the cab?

A Well, it wouldn't surprise me to be at least four feet high if we could take them separately.

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451A Elwell - cross

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MR. ELKIND: May I have that last answer read

## [Answer read.]

As the flames came up through the slots, in accordance with your theory, did they have force behind them that was driving them up to possibly this height of four feet that you speculate?

A Yes.

So, then, these flames would come up somewhat like a blow torch.

No. I didn't say that, sir.

To reach a height of four feet, would they not?

Excuse me. The problem that we are having here is that in the actual nature of the combustion that took place underneath the cab floor what you --

I would rather you concentrated on what went on in the cab itself, if you don't mind.

MR. HAGAN: Your Honor --

[continuing] This is the area I am inquiring about. I don't want to go back to what happened under the hood. I want to concentrate on what happened in the cab.

Now, will you please confine any explanations that you have to make to what happened in the cab, in accordance with your theories, without giving explanations

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Elwell - cross

relating to what happened under the hood?

MR. HAGAN: Your Honor, I object to Mr. Elkind giving an instruction to the witness. I think that is the province of the Court. And if the witness needs to explain what went on under the engine in order to explain what went on in the cab, I think he should have a right to do it.

THE COURT: Well, to answer the question, Mr. Elwell, in order to have a full explanation to the question, if you need to explain anything, you are going to have that opportunity.

THE WITNESS: Thank you.

MR. ELKIND: If your Honor please, may I first direct my questions as to what went on in the cab and then later on, if you want to refer back to the engine and the reasons for it, I'll give him an opportunity to do it?

I don't want to confuse those two items.

that Mr. Elwell may believe that you are distorting his testimony by isolating it, and if he feels he has to have an explanation, then I think he is entitled to that.

But go ahead and, insofar as you can, confine your remarks to what went on in the cab.

THE WITNESS: Yes, sir.

The response then would be that the flames that

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were coming into the cab were a function of the fire, the intensity of the fire which supplied those flames, and there was an intense conflagration underneath the cab and it received the results of the preponderance of the conflagration that existed under the cab.

Q And, if I understand your theory, the conflagration that came up into the cab was of sufficient force
and intensity to set fire to things in the cab even in the
absence of a flammable mixture of gasoline vapors and air;
that's your testimony, is it not?

A Yes.

Now, the first object that would be in the direct path of these flames would be the control levers themselves, is that right? They are right in the middle of this conflagration that is coming up.

A Yes.

O Correct?

A Yes.

And those control levers were painted with black paint, were they not?

A I don't know.

Q Well, Mr. Elwell, can you see this from where you are sitting [indicating]?

A Well, I can see it. It depends on what detail

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you want.

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Q Well, let me bring this somewhat closer.

MR. HAGAN: If you want to, maybe he can come down, your Honor.

THE COURT: I think that would be better.

MR. ELKIND: It may be best for me to hold it.

Q Mr. Elwell, I direct your attention to these black markings [indicating]. Do you see where I am pointing my finger?

A Yes.

Q That's on one of these levers that come through the slits in the floor, is that correct?

A Yes.

Q Do you agree that those are the remnants of Llack paint which appears on the lever?

A I can't identify them from this picture as black paint. That could be a number of different things, including black scale and flakes.

You are talking about this lever here, which is the most forward of the two underneath the dash, right?

- Q The one closest to me, yes [indicating].
- A This one here has very little.
- Q But there are also some black markings on the second one, too, are there not?

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2	A Yes.
3	Q Now, if you have the assumption that this is
4	black paint, would you agree or disagree with the statement
5	that the presence of black paint on that lever is some evi-
6	dence that there was not a fire of sufficient intensity
7	to have gone up the height of, say, four feet?
8	MR. HAGAN: Objection to the form of the ques
9	tion.
10	THE COURT: Objection sustained.
11	Q Now I show you Plaintiff's Exhibit 31, which is
12	a photograph of the same two levers on truck No. 1.
13	Did you actually examine Truck No. 1 at any time
14	sir?
15	A Only through photographs.
16	Q Only through photographs.
17	A Never saw them in person.
18	Ω Will you accept my statement that these levers
19	are painted with black paint?
20	A There appears to be a black coding. I don't
21	know if it is paint or not.
22	Q Maybe paint isn't the right word. But there is
23	a black coding of some kind?
24	A There is some black coating, yes.

And if there had been a fire of the magnitude

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that you speculate took place, would that black coating have been entirely burned off by the intensity of the flames?

- A No.
- Q It wasn't that much of a fire?

A No, that's not the explanation. The explanation is that the levers are not flat levers. So far as I can tell from those pictures, there is a section — if you would like, I can draw it on the board, if it would be more effective an explanation for you — and the shielding, or shadow effect, is something that we commonly encounter in fire investigation in that an amazingly small depression coupled with the heat sink capabilities of the steel lever itself will cause the paint to be degraded and burned out of the most exposed surface but the under surface, as this lever has, will not be similarly affected.

Of the levers that you showed me, the lever that is most forward in the cab was in an area of least oxygen, and the lower flame area is cooler than the higher flame area. The combination gave us the shadow effect.

rearwardly had less opportunity to take advantage of the shadow effect of this lever. The construction of the lever itself caused that pain degradation to occur, or coating degradation to occur, in that manner.

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cab, is it not?

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of paint, or whatever the covering is, is also the lever that is closest to the left, or the driver's side of the

Elwell - cross

- A May I see that?
- Q Yes [handing].

A That is difficult to say. They are reasonably close together. And I would tend to agree with you, but I can't positively say that one lever is closer to the left side of the truck than the other.

Q You can't say that this lever with the black on it is more to the right and that this lever that shows almost a complete loss, or quite more extensive loss, of covering is to the left, or the driver's side? You can't agree with that?

A I can't with certainty. I believe that you are right, but I can't with certainty.

O Showing you the installation on Cab No. 1 as depicted in Plaintiff's Exhibit 31, does that not make it clear that one lever is to the right of the other and that they are actually side by side in installation rather than in front of one another?

A If I understand what you are asking me, choiously yes, they are side by side.

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Q All right.

A But I would have to move this lever, which is the rearward lever in this photograph 31, forward to get them side by side throughout their entire length.

Elwell - cross

Q Well, of course. There is no question about that. But let's get back to Defendant's Exhibit S.

Can we now agree that the lever which shows the more loss of black pigment is to the left, or to the driver's side of the two levers, for whatever distance?

A I can't agree with that.

You cannot agree with that. All right.

Mr. Hughes was seated in the center of the cab with his legs straddling those two fork levers, is that correct? Is that your understanding?

That was my understanding when he was in the truck, yes.

Q Now, would you expect, under your theory, to find that Mr. Hughes' legs had sustained burn injuries?

A I found that his injuries to his legs were consistent, yes.

Ω What injuries do you understand that he sustained
to his legs?

A In this portion here, of his knee and upper fore leg [indicating], right in here --

A No.

board, is it not?

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Q At least as consistent?

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You don't grant that?

No.

Would you expect, under your theory of how this fire came up through the floor board, that at least the hair on Mr. Mughes' lower legs would be singed by the flames coming up?

Elwell - cross

A Not necessarily, no.

Q Okay. Now, under your theory that there was no flammable mixture of gasoline vapors and air in the cab, the fire would have to have touched something, caught something to become a sustaining fire, is that correct; it was a sustaining fire in the cab?

A Okay, it was a sustaining fire in the engine comparament and then it was a sustaining fire in the cab, and then the contents of the dump box was a sustaining fire.

Let's stay with the cab, please.

Okay. A

What caught fire first, on your theory, in the cab?

That would be speculation on my part. I don't have a particular item by item sequential fire involvement of the cab in my mind.

Q Well, you do know, however, sir, do you not,

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that here's Mr. Hughes sitting in the middle, where this 3 fire is supposed to have started, here's Ollert sitting on 4 his right and Brennan sitting on his left, and you do know that both Ollert and Brennan, in the brief moment that they were in the cab and before they could extricate themselves, sustained similar burns - that is, they each sustained

burns of hands and each sustained burns of their face.

Now sir, doesn't that suggest to you that there was in fact a llammable mixture of gasoline vapors and air in the cab which spread from one side of the cab to the other within that first second?

MR. HAGAN: Objection to the form of the question, as to the description of the injuries of Brennan and Ollert as being the same as Mr. Hughes. Brennan and Ollert, all the evidence is, were released from the emergency room the very same day.

MR. ELKIND: All I said was that Brennan and Ollert sustained the injuries in the same places.

THE COURT: Is that correct?

MR. ELKIND: That is their face and their hands,

THE COURT: Is that correct?

MR. HAGAN: May we see --

MR. ELKIND: That is correct, your Honor.

THE COURT: That's all he stated. He is stating

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1	462A 12 jgsr Elwell - cross 857
2	that they had sustained burns on the same portion of their
3	legs and on their face and hands.
4	MR. ELKIND: Not their legs, your Honor; just
5	their hands and their face.
6	THE COURT: All right.
7	MR. HAGAN: No, it is not true. There is no
8	indication that Brennan and Ollert received any burns on
9	their legs.
10	MR. ELKIND: I didn't say they received any on
11	their legs, Mr. Hagan.
12	THE COURT: That was my mistake. Hands and
13	face. The question is hands and face.
14	MR. ELKIND: May I have the question read back?
15	THE COURT: Well, let Mr. Hagan satisfy himself
16	first.
17	MR. HAGAN: It appears they received certain
18	burns on their face and arms, yes.
19	THE COURT: Not on their hands?
20	MR. HAGAN: It doesn't say hands, no. Face and
21	arms.
22	THE COURT: I think you will have to reframe the
23	question.

MR. ELKIND: I beg your pardon, sir?

THE COURT: I think you will have to reframe the.

quest.ion.

MR. ELKIND: All right.

Q If Mr. Hughes were sitting in the middle of that seat, with Mr. Ollert on his right and Mr. Brennan on his left, and if the fire came up through the middle and caught onto something other than a flammable mixture of gasoline vapors and air, would you expect to find that Mr. Ollert had sustained second degree burns of the face and arms and that Mr. Brennan had sustained second degree burns of the face and arms?

A. If I understand the question, yes, the ansear is yes; without a flammable vapor already present in the cab, they would have or could have incurred that type of injury.

Isn't it much more likely, sir, and isn't it much more reasonable, sir, that what caught fire in that cab was a flammable mixture of gasoline vapors and air which spread from one door of the cab to the other at the time it was set on fire?

A No, that is not more reasonable.

THE COURT: I will allow it.

- 0 Is that correct, my statement?
- A If your statement was that the wind was blowing from left to right, the statement was incorrect. If he was saying that that was blowing in the vapors all collectively into the cab like a big bundle of vapor or something, that's wrong, entirely wrong.
- Would gasoline vapors tend to respend to currents of wind?
  - A They certainly do, yes.
- Q All right. And they come down depending on which way the wind was blowing, is that it?
- They don't come down like a feather as you would imply with your hand motion. They come down. They are four times heavier than air and they are behind the window and they are below the window and what you are trying to get me to agree to I am afraid is the gasoline vapors that went to ge down somehow jumped up and into the window and then were blown sideways.
- The door was open at some point, wasn't it?

  THE COURT: It doesn't appear to me now,

  Mr. Elkind, that you are asking the witness a question.

  You are arguing with the witness.
  - Q Let's say the vapors are now in the cab. Do you

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assume that with me?

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A Yes, sir.

O There are vapors in the cab. Aren't they subject to notion depending on the movements of the air currents in the cab?

A That would be one of the forces of nature they would be subject to, but not the only one.

O All right. So that at a particular moment won't you agree, sir, that it is possible for there to be a flammable mixture of gasoline and vapors and air in the vicinity of the ignition even though the entire bottom isn't covered with two feet of vapors?

A No, I disagree.

All right. Now, did you know, sir, at the time that you gave your answer that there was not a flammable mixture of gasoline vapors and air in the cab at the time the rire in the cab started? Did you know that Mr. Bugnes had sustained a loss or a burning in the vicinity of his left eye, but not in the vicinity of his right eye?

MR. HAGAN: May I hear that question reread, please, your Honor?

MR. ELKIND: I will rephrase it.

Did you know at the time that you expressed your opinion that there was not a flammable mixture of gasoline

jwpd 19 Elwell - Cross and vapor in the cab at the time that the first started in the cab that Mr. Hughes had sustained a burning which caused him to lose his eyelashes of his left eye, but not of his right eye? MR. HAGAN: I object to that, your Honor. We have been here now for over a week. There isn't a word of testimony in this record. THE COURT: I don't recall that, either. don't recall anything like that being said. (Continued on Page 878) 1.4 

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Elwell - cross

Q Did you see the pictures that were taken of Mr. Hughes when he was in the hospital?

THE COURT: There is no testimony about that.

We had two doctors here and we had Mr. Hughes testify about his burns. We also had the driver, we also had the people who were witnesses, testify about it.

Q Mr. Elwell, is the location --

MR. HAGAN: Your Honor --

up and down, it is causing Mr. Hagan some problems. Why don't you walk back and forth in back of him? You know he is going to object all the time. He can't see the witness. Walk back and forth so at least I don't have to have that problem.

MR. ELKIND: One of my difficulties besides being a natural pacer is that I have trouble hearing your Honor when you say something.

will do is keep my voice up, and the jury will appreciate that, too.

Q In formulating your opinion, Mr. Elwell, with respect to the presence or absence of the flammable mixture of gasoline vapors and air in the cab at the time that the fire started in the cab, you did, if I recall correctly,

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2 place some reliance on the extent of injury and the location of the burns that had been sustained by the people who were 3 in the cab, am I correct?

MR. HAGAN: I object, your Honor. This is repetitive. We've been all over this, your Honor.

MR. ELKIND: I haven't even touched this subject your Honor.

MR. HAGAN: This was gone into on Friday. It was also gone into this morning. Your Honor, this witness has been six and a half hours on cross and every area that he is going into now is just argumentative and repetitive of prior cross.

MR. ELKIND: I have not discussed the question of the injuries to the men other than the knee. I haven't said one word about the location of Mr. Hughes' burn injuries, your Honor.

THE COURT: Well, I thought you had. My impression was that you had and that you were trying to explain the severity of his burns as being in relation to the igmition switch and Mr. Elwell indicated that the severity of it was based upon the fact that he had difficulty getting out.

I recall that testimony. You can ask the questio... I am not going to bar your cross-examination, but it does

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1	3 jgsr 459k Elwell - cross 880
2	begin to appear to me that you are getting, Mr. Elkind,
3	close to argument and that there is some repetition. But
4	let's proceed and let's see if we can get to it quickly.
5	BY MR. ELKIND:
6	O Do you recall, sir, testifying that this was
7	not an explosion in the cab?
8	A I'm not sure I used that word. I remember that
ย	I described the mine explosion. But I'm not sure this
10	was not an explosion, is that what
11	Q This was not an explosion, right? It was not
12	an exprosion.
13	A That's right.

- Q And do you agree that there was no explosion under the hood of the engine either?
- A Now we are getting into the technical aspect of whether or not gasoline explodes or burns. There was a very rapid combustion of gasoline, most probably the vapors of gasoline in the distributor. At the time I believe that it was described by Mr. Ollert as a pop or firecracker bang or something of that sort, and if that would be classified in your mind as an explosion then I'll accept that.
- Q Well, if we used the term "explosion," it wasn't of sufficient force in any event to throw open the hood.
  - A Oh, no.

but I did not disallow the question.

question.

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THE COURT: I think he did. You started that question about 45 minutes ago. I indicated I thought he had

Q Let me then ask you, sir, whether or not in evaluating the nature and extent of the injuries you took into account the following findings that come from Plaintiff's Exhibit 26, which is the physical report of the Jersey City Medical Center --

MR. HAGAN: I object to that, your Honor, if he starts having a medical report from the hospital record. As the witness earlier said -- he didn't claim he had a hospital record in front of him when he was coming to a conclusion. He is starting to read a hospital record, I submit, which is leading, your Honor.

MR. ELKIND: I am just adding additional points.

THE COURT: I think insofar as the hospital record shows the place where Mr. Hughes, I gather, was most severely burned, then I think he can ask that question. Do not go into details.

MR. ELKIND: Yes.

THE COURT: The issue is where he was most severely burned, I gather.

I am just adding some additional information which

6-2-AM

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THE COURT: No, you may go ahead. Obviously you

	972F
1	jwpd 8 Elwell - Cross 899
2	follow my directions.
3	Q First and second degree burns of the forehead
4	of the whole upper face, more severe on the left side.
5	Swelling of the left upper and lower eyelids of
6	his left eye, nearly closed.
7	Both ears burned, second degree.
8	First degree burn of the whole circumference of
9	the neck.
10	Chest. First degree burn anterior extremity only
11	to the upper chest.
12	In the back extending more extensive to the
13	left side.
14	Now, after hearing those entries from the Jersey
15	City Medical Center, does that change your opinion as to
16	where these flammable where this flammable mixture of
17	gasoline and air came from?
18	A No, that supports it.
19	Q You still think it supports the theory that came
20	up from the floor?
21	A Absolutely.
22	Q Even though the left side is more severely burned
23	than the right?

Even though his back was burned on the left side?

Yes, sir.

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THE COURT: I think we ran into that about half an hour ago.

Making your opinion with respect to that issue,
were you aware of the fact that following their release from
the Jersey City Medical Center that both of these men sought
further medical care at the North Hudson Hospital in
Weehauken and that the emergency room records of the North
Hudson Hospital in Weehauken --

THE COURT: I had indicated to you -- is that the exhibit just put in?

MR. ELKIND: These are the exhibits put in evidence.

THE COURT: I just let them in?

MR. ELKIND: Yes.

THE COURT: Didn't you understand my saying that they were going to be allowed in, but because they hadn't been but in when these people were on the stand that I did not regard this as being fair because Mr. Hagan couldn't cross-examine these men about the entries?

MR. ELKIND: All I can do is take exception to your Honor's ruling.

O Mr. Elwell, the qualities of gasoline that have been discussed in this courtroom, that is, it's inflammability limits, the mixture of air had the propensity to be moved by convection currents and wind currents, and so forth, and its gravity, these are scientific facts that have been well known for what, over 75 years; is that correct?

A I don't know exactly what date or time, but certainly well known in the last 10 or 15 years.

Q Well, we are talking about a truck that was designed in 1949.

A I am sure they were pretty familiar with gasoline in 1949 also.

Q Of course. Do you know when the internal combustion engine was invented?

THE COURT: Come, Mr. Elkind. We don't need that.

MR. ELKIND: Does your Honor sustain the

2 objection?

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THE COURT: I don't see any point in our learning

MR. ELKIND: I just want to establish the point of time that the internal combustion engine was invented.

THE COURT: No, we don't need that.

MR. ELKIND: If your Honor please, I want to approach the bench with respect to an item that we kept open at an earlier side bar conference having to do with -

THE COURT: All right.

(At the side bar.)

THE COURT: What is this about?

MR. ELKIND: The point is I now want to ask the witness a question with respect to subsequent modifications, that is the elimination of the design feature of the gasoline tank in the cab of the truck. I don't think your Honor has definitely rule? on that. I would like a ruling for the record.

will tell you my answer now. I am going to allow it.

MR. ELKIND: All right.

read the cases there are New Jersey cases that don't allow it, but even assuming that New Jersey follows California's

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precedent, the California case cited to me, my problem is that as I understand those cases they are dealing with obvious danger, the subsequent modifications of obvious dangers. For the life of me I can't say that where the tank has been placed it is an obvious danger and that it therefore was going to ignite and that therefore these things were going to occur. So, therefore, the question of modifications seems to be not to relate the kind of problems that we have. That is my reason for it.

MR. ELKIND: Your Ponor, may we have the memorandum of law that we submitted to the Court marked for identification on this point?

THE COURT: You don't need that. I have denied it and you made your point. You have preserved your argument for the record.

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Mr. Hughes.

RICHARD HUGHES, the plaintiff, called in rebuttal as a witness in his own behalf, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

## BY MR. ELKIND:

- O Mr. Hughes, on the morning of the fire and before the fire approximately how many stops did the truck make?
- A Anywheres from 35 to 50.
- Q And at the time that the stops were made -are those pickups?
- A Pickups, sir, yes, sir.
- O At the time those pickups were made, was the engine running or turned off?
- A Turned off and put into gear.

MR. HAGAN: I object to this testimon, your Honor. We have him here on direct. We took him through what happened the morning of the accident. It is just repetitive testimony.

MR. ELKIND: There is no testimony on this subject, and yet the witness made an assumption, your Honor, which I am now showing is not grounded in fact. I think that it is very proper for me to introduce this evidence as part of my rebuttal case.

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1	jwpd 16 Hughes - Direct 007
2	THE COURT: I don't think so.
3	MR. ELKIND: Your Honor, I made no point on the
4	direct case
5	THE COURT: I don't
6	MR. ELKIND: Could I be heard, sir? I made no
7	point whatsoever on my direct case with respect to starting
8	and stopping.
9	THE COURT: But the point was made and the
10	assumption was made and you are now coming in on this.
11	It should have been done before. I am going to sustain
12	the objection.
13	MR. ELKIND: The defense was that they had this
14	leak and that the ignition was in the distributor. That
15	came in by way of the defense in this case and now I am
16	on rebuttal and I am just trying to show there was no factua
17	basis for that part of the defense, your Honor. How can
18	you exclude this testimony?
19	THE COURT: The objection is sustained.
20	MR. ELKIND: There is no point in proceeding
21	then. If that isn't admissible, I don't know what is.
22	THE COURT: Are you through?
23	MR. ELKIND: Just give me a minute.
24	(Pause.)
25	MR. ELKIND: I am very much surprised by your

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Honor's ruling.

THE COURT: Mr. Elkind, you know you are bordering on being contemnacious. I am very patient. I suggest you control yourself as I am controlling myself.

Hughes - Direct

MR. ELKIND: One more question of Mr. Hughes -one more line of questions.

Q When prior to Saturday, the morning of the fire, to your best recollection was the gasoline put in that truck?

MR. HAGAN: Again, your Honor, I object to going back over the day and the week before the fire which was all gone into on direct examination.

THE COURT: I thought that had been gone into. I thought there was testimony about when there were gas stops and so forth which were gone into when the drivers testified. That objection is sustained.

MR. ELKIND: That is sustained, too?

THE COURT: Yes.

MR. ELKIND: I have nothing more.

THE COURT: All right. You are excused.

(Witness excused.)

MR. ELKIND: Professor Weinstein, please.

ALVIN S. WEINSTEIN, called as a witness

in rebuttal by the plaintiff, being first duly sween,

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testified as follows:

DIRECT EXAMINATION

BY MR. ELKIND:

Professor Weinstein, you have heard the theory of the fire as has been suggested by General Motors in this case. Does this theory in any way alter the opinion that you expressed that there must have been gasoline vapor within the cab of the truck whose source was from the location of the gasoline tank or the filler neck and not from a leak in the engine compartment?

MR. HAGAN: Objection, your Honor.

THE COURT: The objection is sustained.

Q Is it still your opinion, Professor Weinstein, after listening to the testimony of Mr. Elwell, that there was gasoline, a flammable mixture of gasoline, vapor and air in the cab of the truck --

MR. HAGAN: Objection.

Q -- that did not come -- please let me finish -- which did not come from the engine compartment?

MR. HAGAN: Objection, your Honor.

THE COURT: The objection is sustained.

You might as well be clear that I am not going to allow any redirect which merely has Professor Weinstein stating what

he had told us in his prior testimony.

SOUTHERN DISTRICT COURT REPORTERS, U.S. CCURTHOUSE

jwpd 19 481k Weinstein - Direct 1 Q Are you of the opinion, sir, that as expressed by 2 Mr. Elwell, gasoline, flaming gasoline vapors came up through 3 the slots around these levers? MR. HAGAN: Objection, your Honor. 5 THE COURT: He just told us he is not. Objection 6 sustained. Q Is it scientifically probable for gasoline vapors, 9

flaming gasoline vapors to have come up through the slots in which these control levers worked and caused the damage to the passenger and to the body of the cab that has been explained here to the jury?

MR. HAGAN: Objection, your Honor.

THE COURT: Mr. Elkind, I think that I am going to sustain it. I think Professor Weinstein has already told us that. He told us that those were the probabilities and he indicated that the problem in terms of the injury and everything else, that the fire started in the cab.

MR. ELKIND: Now, I am asking him in effect, your Honor, to comment on the theory of the defendant, which I understand is an appropriate function for rebuttal on scientific questions, since I have the burden.

THE COURT: You are asking him to restate his own opinion, what he already told us.

MR. ELKIND: He hasn't testified with respect to

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considered it more probable that it started in the cab? THE WITNESS: No, your Honor, I did not state that.

THE COURT: Well, I don't understand. Then I am

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completely at a loss because that is precisely what I understood vour testimony to be.

Weinstein - Direct

I want to look at the record.

MR. HAGAN: Page 398, your Honor.

THE COURT: I have listened to all the testimony as carefully as I could.

MR. HAGAN: 398 through 402. Specifically 398, Line 16.

MR. ELKIND: That is not the question your Honor asked the witness.

THE COURT: All right. You indicated that the high probability was that it started at the ignition switch. (Reading:)

"Q. Will you state your reasons for having that opinion?

"A. First of all, I believe in your hypothetical question you indicated the close proximity of the flash of fire to the moment of turning on the ignition switch. There are, of course, other places within the truck that would develop sparks, but all of the rest are under the hood, and with the fire wall there, fine, you might have a spark there. You might even have a fire there, but with the very tiny holes that come through the fire wall you are not going to get a flash

26-4-AM

- Would you remeat the question, please? A
- I really don't remember, Professor. 0
- No, I did not specifically --A
- I beg --0

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A I did not specifically address the possibility of an ignition source of gasoline vapors in the cab coming up through the hole in the floor from the --

MR. ELKIND: May I ask that the witness be permitted to comment on that part of the defendant's theory, your Honor?

MR. HAGAN: Your Honor, I object to the witness just restating. He was here and told the jury and your Honor what he thought. This is the second --

THE COURT: Professor Weinstein, I am sorry, certainly you were asked about whether you thought the fire originated in the engine and you said that you examined both probabilities and possibilities of it and you didn't feel that it originated there and gave me a reason why it originated in the cab.

think I -- if I gave that impression, it was erroneous.

What I think I said was there were two fires and I don't know whether the fire in the cab was started by some flame coming through the fire wall, or whether the fire in the cab was ignited by the ignition switch. The last question that Mr. Elkind asked me was on the basis of the policeman's testimony that they saw fire from the cab and later the fire from the hood, which started first. I said I wasn't certain

jwpd 23.

jwpd 23A Weinstein - Direct

which started first. But the thrust of my testimony was
that there had been vapors in the cab. I wasn't certain
as to the ignition, the probable cause of the emission was
the ignition switch, but there could have been sources of
vapors from the cab.

(Continued on Page 915)

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1	l jgsr Weinstein - direct 915
2	THE COURT: Yes. But your theory was that the
3	vapor was in the cab and that's the only way the fire could
4	have occurred under your theory, because of vapors occurring
5	in the cab, and that was the source of the fire in the cab.
6	THE WITNESS: Yes, the source of the fire in
7	the cab.
8	THE COURT: That is precisely what I understood
9	you to be saying.
10	THE WITNESS: I'm sorry. That's one factor, I
11	would say.
12	THE COURT: No, I'm not going to allow it.
13	I don't see that it adds anything to it. It is merely a
14	restatement of what he has indicated.
15	BY MR. ELKIND:
16	Q In your theory, sir, that the gasoline vapors
17	were inside the cab, how do you explain the circumstance that
18	none of the witnesses testified here that they smelled the
19	gasoline in the cab?
20	MR. HAGAN: Objection, your Honor. That again
21	was completely gone into.
22	THE CCURT: I think so, because he was asked
23	about the smell of gasoline by either one or both of you,
24	and he was taken over there and asked to smell it to see

whether or not he could identify it as gasoline.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK				
	X	72 Civ.	1811	(RLC
SAME TITLE	:			
	17			

## PLAINTIFF'S SUPPLEMENTAL REQUEST TO CHARGE

4-A. In determining whether the defendant was negligent in the way it designed this vehicle, you will ask whether the risk of injury to the passengers presented by having a fuel tank in the passenger compartment, with a filler neck of separate parts joined by clamps which were neither accessible for visual inspection nor for periodic tightening and maintenance, and with a filler neck tube exiting just a few inches behind the driver's window, whether these risks are greater than the utility of having a truck which is designed in such a way.

If you find that the risk of injury is less than the utility of having a vehicle designed this way then the defendant has exercised reasonable care and you will return a verdict against plaintiff and for defend mt.

If, however, you find that the risk of injury is greater than the utility of having a vehicle designed this way, then defendant has been negligent in designing its vehicle and you will return a verdict for the plaintiff, RICHARD HUGHES, as a against the defendant, GENERAL MONORS CORPORATION. Nelson v.

Freuhauf Trailer Co., 11 NJ 413, 94 A. 2d 655 (1953)

Dated: N.Y., N.Y. May 27, 1975 Respectfully submitted,

ARNOLD B. ELKTND Attorney for Plaintiff 122 East 42nd Street New York, New York 10017

UNITED	STATES	DISTRICT	COURT
SOUTHERN	DISTRI	CP OF NE	W YORK

SAME TITLE :

SUPPLEMENTAL REQUESTS TO CHARGE BY DEFINDANT GENERAL MOTORS CORPROATTON

72 Civ. 1811 (RLC)

## Liability

24. A manufacturer is held to a reasonable duty of care in the design of its vehicles consonant with the state of the art as it existed at the time of manufacture. The manufacturer is not an insurer but should be held to a standand of reasonable care in design to provide a reasonably safe vehicle in which to ride. Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968). Therefore, in order to comply with the law's command that he prove by a preponderance of the evidence that the truck here in question was, in fact, defective, the plaintiff must establish that, evaluated in the light of generally accepted concepts and practices with respect to the design and installation of gasoline tanks prevailing for trucks of this nature in 1966, this particular gasoline tank design was unreasonable. In making this determination, you may consider where other manufacturers were placing gasoline takes in the trucks they built in 1966. Bexga v. Havir Manufacturing Co., 60 N.J. 402, 290 A.2d 281 (1972). If, based upon these considerations, you conclude that the gasoline tank design used by Gereral Motors in the manufacture of this truck was a reasonable design and that a truck incorporating this design was a reasonably safe one in

which to ride, you must return a verdict for General Motors Corporation.

\* \* \*

Respectfully submitted,

SIMPSON THACHER & BARTLETT Attorneys for Defendant General Motors Corporation Office and P.O. Address One Battery Park Plaza New York, New York 10004 (212) 483-9000

Page 6, the conclusion of 13 is granted in substance.

14 denied. 15 denied. 16 I think is covered.

17 and 18 are denied. 19 and 20 are granted. 21 is granted.

On the question of damages, I have my own approach to it, and it will cover all of the items, but I think

I have to get how much the man earned and what his hospital bills were and so forth since I'm to give that and tell the jury to disregard the testimony that they have been paid.

So I will have to have --

MR. WASSERMAN: I believe I gave it to Clarke.

MR. ELKIND: You will give it in such a way,
I assume, so that the jury won't conclude that Mr. Hughes
was not telling the truth?

although he testified, that they are, on the issue of damages, allowed to consider these items and make awards for them.

MR. HAGAN: Your Honor, while we are on that point, may I renew my request that the charge of your Honor be limited to liability until the jury has found the defendant liable?

THE COURT: Let me finish with this. Then we can deal with that.

25 is granted in substance. 26 I think I've already covered. 27 granted in substance. 28 I've covered

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

491A
1 10 jgsr
1 10 jgsr 2 in pain and suffering. And 29 and 30 in substance. 2 I don't know which one of these comes first.
3
T have tilled
MR. HAGAN: I have  MR. HAGAN: I have  One is dated May 21, one is dated
May 23rd, and the third is dated May 27th.  THE COURT: All right. Maybe that will help.
THE COURT: All right. May 20  9 I didn't look at the dates. This one I haven't gone over
yet.  The one dated May 21, I'm granting that in sub-
The one dated May 23, 13A, the first party
a paragraph 15
request, I can t de
MR. ELKIND: This is risk of any
utility of the design.  Think I am going to deny that.
THE COURT: I think I am gozna
thoy are granted
I am not introducing that element 20  8 and 9, 10 and 11, 12, 13 and 14 are granted in substance.  I may change my mind, but as I have developed  I may change my mind, but as I have developed
I may change my mind, be
I may change my mile.  23 the charge up to the present time I don't propose to deal  24 with any of the facts. I am not commenting on the evidence
with any of the facts. I am not that any of the facts. I am not that complicated.  I don't think that this case has been that complicated.
I don't think that this case

1	11 jgsr
2	So I am merely going to give them a charge on the law. So
3	the upshot of that is that I am not giving 15.
4	16 and 17 are granted in substance. 18, 19, 20,
5	21 and 22.
6	What is the evidence about Mr. Hughes' knowledge?
7	He made some statements that the truck was a piece of junk;
8	is that before the jury?
9	MR. HAGAN: I asked him on cross, your Honor,
10	something about this was a piece of junk, and he said, "Yes,
11	that's what I said on my deposition."
12	THE COURT: All right. I was having problems
13	with contributory negligence until I remembered, or I thought,
14	there was some testimony about that. So I suppose on that
15	theory I will have to allow a charge on contributory neg-
16	ligence.
17	On the issue of 24 and 25 and 26 and 27 and 28
18	and 29, I'll grant those in substance.
19	Your exceptions to my denials of any of your
20	requests and my granting of any of the other party's requests
21	of course is automatically protected in the record.
22	How much time do you gentlemen propose to take?
23	MR. HAGAN: I am estimating an hour, your
24	Honor. I would ask an hour and a half, but I expect cer-
25	tainly to be finished before that. I was merely trying to

12 jgsr

be overly conservative. I would guess an hour.

MR. ELKIND: I had said an hour and a half,
your Honor. Personally I don't think it is to my advantage
at this point to make an overly extended summation. I
recognize the advantages of trying to be brief, but I wish
your Honor would not cut me off if I stay within the bounds
of an hour and a half.

to do, gentlemen. If I see you can't complete this in an hour, what I'll do with both of you is advise you of the hour, if you are still talking, and I will then allow you about ten minutes. It seems to me that ought to be enough time for both of you.

I always feel that the long speech is one that is not organized. The short speech requires preparation.

So I am asking you to do that.

Now let's get to this point of putting the issue of liability to the jury first.

MR. ELKIND: If your Honor please, I don't see how anything positive could be accomplished, either in terms of clarifying the jury's deliberations or in saving judicial time, by having two separate verdicts. I think that if your Honor gives one charge and there is one argument, and the jury brings in one verdict, either for the plaintiff or

13 jgsr

for the defendant, and if for the plaintiff in an amount, that is the most expeditious and reasonable way of handling the verdict.

MR. HAGAN: Your Honor, my position is basically the same as it was when I had asked for a split trial, that in a case of this kind, where the liability issue has been fiercely contested and the damages have not been that strongly contested, at least as far as medical injuries are concerned, if there was a valid reason for having to try them together because of doctors' schedules and things of that sort, that it might have interfered with the trial to try them separately, that is one thing.

But we are now at a point where all the evidence is in. There will be no delay in finishing up the trial. At most the delay might be a half hour or an hour. And while they are focusing on the liability issue, your Honor, it would be distracting and, I think, prejudicial to have all of the charge relating to damages and loss of income and pain and suffering at that point while the liability issue is still before them.

THE COURT: Well, I'll tell you, gentlemen.

If I had known really about this case as it developed, I would have insisted that the two issues be tried separately.

The problem I have with it is that I don't know now whether

it is going to be appropriate to split them up.

in order for there to be really a fair and objective analysis,

has to be on who is at fault and whether or not or the

strict liability issue. When they get down to the question

of damages, then it just appears to me that they are not

going to focus on liability. And, quite frankly, this case

could have been tried that way, but I accepted your repre-

sentation that they were intertwined.

But they are not intertwined. The whole liability question, particularly in product liability, is totally separate from what the injury is, and the jury ought to be required to focus in terms of its own responsibility, on whether the question of liability in theory has been proved.

I don't believe that they can do that or that they will do that properly if the argument and summation is made together.

But, now that they have been tried together, what I am going to have to do is think about whether or not to separate them in terms of argument and in terms of the charge. I will have to give that some thought. I will let you know when I come back.

Of course, that may change your time because I

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would think, if I did separate them, you could sum up on liability to the jury, and I think you are going to spend most of your time with that, and I don't propose to keep the jury here. I am going to charge them tomorrow.

MR. ELKIND: But your Honor should tell us before we sum up to the jury what you are going to do.

THE COURT: I have to do that. But I have to think about it. I have really been thinking about it, I must say, with both of you. I think it would be fairer to have them split. But at the same time, since they were tried together, the question in my own mind is whether it is appropriate to do so. I just haven't resolved that question.

MR. ELKIND: Your Honor, as far as fairness is concerned, I've been practicing for thirty some-odd years, really 35, I've lost track, but the traditional way of handling all personal injury cases has been, until maybe the last six or seven years, always to try liability and damage together, and it has never been thought of as unfair or --

THE COURT: I know. The reason I have taken the liability and damages separately in a case that I have is not because of unfairness but because of efficiency.

MR. ELKIND: That's the way I understood it.

THE COURT: But this is the first case I have had where I think it is unfair.

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MR. ELKIND: I hope your Honor will not mind if I sharply disagree about the element of unfairness.

THE COURT: I don't mind your sharply disagreeing with me in here.

MR. ELKIND: And also with respect to your Honor's view that there is no inter-relationship between the damages and liability in this case.

THE COURT: No.

MR. ELKIND: Because an essential element of the liability factor is the nature of the damages, the burns that this man sustained, where they are located.

THE COURT: Well, in a general way, but not the extent of it. It seems to me that the design of the engine--

MR. ELKIND: You know, I tried to make a point with respect to the fact that the burns were on the left sice and that he had a burn on his left back and that he only had burns on his knees and not on his legs.

THE COURT: That's all in support of your theory that the engine was defectively designed.

MR. ELKIND: Not the engine.

THE COURT: Or the gas tank.

But, as I think I told you earlier, my own feeling was that you could bring that kind of thing in there to support, in terms of the injuries. But we are now talking

1 931 17 jgsr about the nature of the injuries, the extent of it, not where they were, how much money he lost and so forth and so 3 4 on. 5 MR. ELKIND: That is the only thing that is left 6 really is the hospitalizations and the treatment. 7 THE COURT: I'll let you know. Frankly, my inclination is, I've let it go this far, Mr. Hagan, that 9 we are going to have it all together. But I do have some 10 problems about it and I'll let you know when we come down-11 stairs, before you start your summations. 12 MR. HAGAN: Can we have until 2:30, your Honor? 13 THE COURT: Come down as close to 2:15 as you 14 can. But, if you don't get back until 2:30, I won't hold 15 you in contempt. 16 [Luncheon recess.] 17 18 19 20 21 22 23 24

1 mcpd 1 1120 2 RICHARD HUGHES 3 -against-71 Civ. 1811 GENERAL MOTORS CORPORATION 4 ó May 28, 1975 10:00 a.m. 6 7 (Trial resumed.) (In the robing room.) 9 THE COURT: I have a special verdict that I am going to give to the jury. I would like you gentlemen to 10 go over it and I will be amenable to suggestions and 11 12 modifications. 13 The other thing I wanted to raise with you is that both of you requested a charge in connection with 14 depositions, but I don't recall the depositions being used 15 except as impeaching the witness. 16 MR. ELKIND: No depositions went into evidence. 17 18 MR. HAGAN: It was not only impeachment but with respect to the plaintiff, we went into the deposition where 19 he testified as to damages. The deposition was used both 20 for impeachment and for direct evidence. 21 22 THE COURT: My own feeling is that in terms of a charge that deals with inconsistent prior testimony, I cover 23 it that way rather than with the deposition. 24

MR. HAGAN: That is right.

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THE COURT: I will give you an opportunity to look at the questions for the jury, the form of verdict, and when you come in after the charge has been read, if you have any suggestions I will appreciate it. My reason for giving it to you now is to allow you to read it so that when I give it to the foreman when the jury goes out it won't come as a shock and surprise. You will have an opportunity to make any objection you wish to make.

In regard to the figures that we have had some question about, I am going to recite the figures that you have given me as to the hospital bills, \$29,000, and a loss of wages, \$26,000, and I am going to say: That you heard testimony that the plaintiff's medical bills and salary have been paid. However, it is agreed that you are to disregard that testimony in calculating the damages and you take into account the figures for medical expenditures and loss of wages.

Is that all right?

MR. HAGAN: Yes.

MR. ELKIND: Satisfactory.

(In open court, jury present.)

THE COURT: Ladies and gentlemen, I am going to begin my charge, but in terms of mechanics if any of you, the jurors particularly have to hear this, if you are not

up.

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Now, first, I want to thank you for the close attention that you have paid to the testimony that has been introduced in this case and your effort to absorb all the facts and inferences which have been placed before you during the course of this trial.

hearing me, sort of raise your hand and I'll k. ap my voice

We now come to that part of the trial where you are to perform your function, and your function is in three parts.

First, you are to decide the fact issues in this case.

Second, you are to apply the facts as you find them to the law as I shall give it to you.

Third, you are to render a fair and impartial verdict in this case for each of the parties involved.

You will recall that at the beginning of the trial I stated to you certain principles so that you would have them in mind as the trial progressed. Briefly they were that you were absolutely bound to accept the law as I gave it to you without reservation and, further, that you must not infer by my rulings or anything I have said during the trial that I hold any views for or against any party in this litigation.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel, either for the plaintiff or the defendant, may have said with respect to matters in evidence during the trial, in a question, in colloquy with the Court, in argument, or in summation, is not to be substituted for your own recollection of facts.

So, too, anything that the Court may have said during the trial, or may refer to during the course of these instructions, as to any factual matter in evidence, is not to be taken in lieu of your own recollection.

Now, in reaching your decision you may not consider testimony which has been stricken. You must decide the degree of weight you choose to give to the testimony of any particular witness and, to do so, as I have instructed you before, you use your ordinary common sense. The tests used in your everyday life to determine the reliability or unreliability of statements made to you by others are the tests you should use in determining whether to believe or not to believe a witness.

Among the items to be taken into consideration in determining the weight you will assign to the testimony of a witness are the interest or lack of interest of that witness in the outcome of the case, his bias or prejudice,

if there be any, his age, his appearance, the manner that he gives his testimony from the stand, the opportunity that the witness had to observe the facts concerning which he testified, and the probability or improbability of the witness' testimony when viewed in the light of all the other evidence in the case.

You observed the witnesses and heard their testimony. How did they strike you? Did their answers seem frank, open, truthful, candid; or were they equivocal, deliberately confusing or evasive? Or were they somewhere in between? So you take each one and on the basis of your common sense and your everday experience you determine whether you believe the witness and the extent to which you believe him.

In passing up in the credibility of a witness, you may also take into account whether there were material inconsistencies or contradictions within his testimony; whether a witness changed his testimony; and the extent to which he has been corroborated or contradicted by other credible evidence.

to the facts as they occurred because the witness is
intentionally telling a falsehood or because the witness
did not accurately observe the events about which he testified.

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or because his recollection of what happened is at fault, or even because he has not expressed himself clearly in giving his testimony.

You are also entitled to consider the possibility that where a witness is called upon to testify long after the event that inconsistencies may result from an innocent mistake or lapse of memory rather than from a deliberate attempt to falsify or change facts. It is not unusual for a witness in a proceeding long after the fact to utter inconsistencies at some stage.

appears to be different versions of the facts, you will have to determine whether the apparent discrepancy in the evidence results from an understandable error which can be reconciled so that the two versions fall together rationally. If, however, you find that this is not appropriate or possible, you will then have to decide which version you will accept. You may accept so much of the testimony of a witness as you may deem true and disregard the rest. You are at liberty, if you deem it appropriate, to disbelieve, in whole or in part, the testimony of a witness even though it has not been otherwise contradicted or impeached.

Now, an interested witness is not necessarily

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unworthy of belief, but it is a factor which you may consider in determining the weight and credibility to be given to that witness' testimony.

If you find that any witness has willfully testified falsely to any material fact, you may disregard all of his testimony or accept such part of it as you believe worthy of belief as it appeals to your reason and your judgment.

During the course of this trial you have heard various expert witnesses testify here. Mr. Elwell and Professor Weinstein testified on the combustion of fuels and engineering analysis of fuel systems and the probable or most likely origin of the fire which resulted in plaintiff's injuries. You have also heard the testimony of Dr. Rothfleisch and Dr. Tobias who testified as expert witnesses in the medical field concerning the injury to the plaintiff.

Now, these witnesses testified as to their qualifications as experts in their various fields. The opinions stated by them were based upon particular facts as the expert himself observed or analyzed them or as the attorney who questioned him asked him to assume.

While you must consider the expert's testimony in arriving at your determination, an expert is subject to the

reject his opinion if you find the facts different than he assumed them to be or if you find his testimony unconvincing. You may give the expert testimony such weight as you feel it deserves. The determination rests with you and not with the expert.

During the course of the trial a umber of stipulations have been entered into and read to you. A stipulation is an agreed statement of facts between the attorneys for the plaintiff and the defendant and you should regard such stipulated facts as undisputed evidence.

Each party has also introduced into evidence certain interrogatories — that is, questions together with answers signed and sworn to by the opposing party. A party is bound by his own sworn answers. When introducing an opposing party's answers to interrogatories, however, the introducing party does not bind himself to these answers, and he may challenge them in whole or in part or may offer contradictory evidence.

In making the factual determination on which your verdict will be based, you may consider the exhibits, the stipulations and the interrogatories which have been admitted in evidence and the testimony of witnerses here in court.

There are, generally speaking, two types of evidence from which you may properly find the truth as to the facts in this case. One is direct evidence, such as the testimony of a witness as to what he saw or heard. The other is indirect or circumstantial evidence, the proof of circumstances from which inferences may be drawn on the basis of common experience. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all of the evidence in the case, both direct and circumstantial.

Fact-finding does not require mathematical certainty. You are permitted to dr ', from facts you find have been proved, such reasonable inferences as seem justified in the light of your experience. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

No let me instruct you on the burden of proof.

In order to prevail on his claims, the plaintiff has the burden of proving each essential element of his case by a fair preponderance of the evidence. A fir preponderance of the evidence simply means the greater weight of the evidence. It is not necessarily to be determined by the

greater number of witnesses testifying to a fact or set of facts. It merely means that the evidence in favor of the party on whom the burden rests must have more convincing weight than the evidence which is opposed to it.

To illustrate this point we judges often use the following illustration, and I hope it will clarify it for you:

Inet's assume that as jurors you have before you an apothecary's scale or the scales of justice, and as you evaluate all the evidence in this case you hold, imaginative that scale up in your hand, and you place on one side of the scale the credible, the believable evidence in favor of the plaintiff, and on the other side of the scale the credible, believable evidence in favor of the defendant. In doing this you take into account, as I indicated earlier, the testimony of all the witnesses, both direct and crossexamination, and the various exhibits and stipulations that were received in evidence.

If, after considering all the evidence, you are satisfied that the plaintiff's evidence in terms of quality and credibility on each essential point as to which he has the burden of proof outweighs that of the defendant, then the plaintiff has met his burden of proof.

If, after consideration of the total evidence,

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If, after considering all the evidence, you are satisfied that the plaintiff's evidence in terms of quality and credibility on each essential point as to which he has the burden of proof outweighs that of the defendant, then the plaintiff has met his burden of proof.

If, after consideration of the total evidence,

however, you find that the evidence of both parties is equally weighted or in balance, then the plaintiff has failed to sustain his burden of proof.

If you find that the believable and credible evidence is weighted in favor of the defendant, then obviously the plaintiff has failed to sustain his burden of proof.

Now, this case must be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

This lawsuit involves two claims by the plaintiff, Richard Hughes, against the defendant, General Motors

Corporation. The first claim is that the defendant was negligent in the way it designed the truck in which plaintiff was injured. It is plaintiff's contention that the defendant negligently placed the gas tank and its ancillary parts within the cab of the truck, and that this negligence caused plaintiff's injuries.

Plaintiff further contends that there were places

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outside the cab where the defendant could have placed the gas tank so as not to create the hazard which plaintiff asserts arose by virtue of the placement of the tank in the cab.

Plaintiff's second claim is directed towards the truck itself as opposed to the conduct of the defendant in designing the truck. That is to say, plaintiff contends that the truck was defective because of the way it was designed and as a result the manufacturer and designer of that truck, the defendant herein, should be held strictly liable for the injuries which plaintiff sustained.

and the second for strict liability, should be evaluated by you separately. The mere fact that the accident occurred does not entitle the plaintiff to a verdict against the defendant. General Motors may be held liable only if the plaintiff proves one of its claims by a fair preponderance of the evidence.

Now, before I go further let me just briefly outline to you what I understand to be the contentions of the parties, and I want to remind you that if in the course of my stating these contentions I allude to any facts, again, it is your recollection and not mine that governs.

As I understand it, plaintiff's basic contention is

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that the placement of the gasoline tank in the cab of the truck allowed or caused vapors to enter the cab while the truck was taking on gas and that these vapors were ignited when the ignition switch was turned on causing plaintiff's injuries, and that the fire in the cab would not have occurred and the injuries to the plaintiff would not have resulted but for the gas tank's placement.

Defendant contends that the gas tank being in the cab had no relationship whatsoever to either the origin of the fire or to the fire in the cab which caused plaintiff's injury; that the origin of the fire was in the engine and that the vapors which were aflame in the engine traveled to the cab and that there were no vapors in the cab which were separately ignited.

plaintiff in this case claims damages for personal injuries alleged to have been suffered as a proximate result of negligence on the part of the defendant.

In order to prove the essential elements of the first claim, that is, the negligence claim, the plaintiff has the burden to establish by a fair preponderance of the credible evidence the following facts:

First, that the defendant General Motors was negligent in the way in which it designed the truck and gas tank system; and,

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Second, that the defendant's negligence was a proximate cause of some injury and consequent damage sustained by the plaintiff.

reasonably prugent person would not do, or the failure to
do something which a reasonably prudent person would do,
when prompted by considerations which ordinarily regulate the
conduct of human affairs.

It is, in other words, the failure to use ordinary care
under the circumstances in the management of one's personal

property or of agencies under one's control. Ordinary care is the care which a reasonably prudent person exercises in the management of his own affairs in order to avoid injury to himself, to his property or the persons and property of others.

In deciding whether the defendant was negligent in the way it designed this truck, you are hereby charged that the defendant here, General Motors Corporation, has a duty under the law to exercise reasonable care and skill in designing its trucks and the component parts thereof so that it will be reasonably safe for its intended use. While a manufacturer of a product is not an insurer of its safety, he is under a duty of care to avoid all unreasonable risks

of harm from its uses, and when such risks are foreseeable he must take reasonable precautions to avoid them.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

This doesn't mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

General Motors contends that Mr. Hughes was contributorily negligent in that he was riding in a vehicle he knew to be maintained in a dangerous condition. I have already instructed you as to the law of negligence in respect to the defendant and you must apply the same rules to determine whether the plaintiff was negligent. Briefly, you must determine whether the plaintiff used ordinary care under the circumstances for his own safety.

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In raising the defense of contributory negligence, the defendant alleges either that the plaintiff's own negligence was the sole proximate cause of his own injury, or that even if the defendant or his agents were negligent, and even if such negligence was one of the proximate causes of the plaintiff's injuries, nevertheless the plaintiff's own negligence was also one of the proximate causes of the plaintiff's injury.

I told you that the plaintiff bore the burden of showing by a fair preponderance of the evidence that the defendant was negligent and that its negligence was a proximate cause of plaintiff's injuries.

Now, with respect to the issue of contributory negligence, the burden is on the defendant to establish by a fair preponderance of the evidence that plaintiff was contributorily negligent and that his negligence was the sole proximate cause or one of several proximate causes of his own injuries.

If you determine that the plaintiff was contributorily negligent and that this contributory negligence was
the sole proximate cause of the plaintiff's injuries, then
plaintiff cannot recover damages from the defendant under
a negligence theory. I instruct you further, however, that
if you should find that the defendant's negligence was in

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part the proximate cause of the plaintiff's injury, and if you should further find by a fair preponderance of the evidence that the plaintiff was guilty of contributory negligence which was a substantial factor in bringing about his harm, then he also cannot recover from the defendant under his negligence claim. I repeat, the plaintiff is barred only of his contributory negligence was the sole proximate cause of his injury or a substantial factor in bringing about his injury.

was in part the proximate cause of plaintiff's injury, and if you should further find by a fair preponderance of the evidence that the plaintiff was guilty of contributory negligence which was a proximate cause of his own injury, but not a substantial factor in his injury, then plaintiff may be barred only from recovering so much of his claim as is attributed to his own negligence. The defendant has the burden of carving out that portion of the damages which is attributed to the plaintiff.

Now, the issues to be determined by you in the negligence claim are as follows:

First, was the defendant negligent?

If your answer to that question is "No," you will return the verdict for the defendant; but if your answer is

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"Yes," you then have a second issue to determine, namely:

Second, was the negligence of the defendant a proximate cause of any injury or damage to the plaintiff?

If your answer to that question is "No," you will return a verdict for the defendant; but if your answer is "Yes," then you must find the answer to a third question, namely:

Third, was the plaintiff guilty of any contributory negligence?

If you should find that he was not, then having found in plaintiff's favor in answer to the first two questions, then you will return a verdict for the plaintiff for damages pursuant to instructions that I shall give you subsequently.

On the other hand, if you should find that plaintiff was guilty of some contributory negligence, then you must find the answer to a fourth question, namely:

Fourth, was the plaintiff's contributory negligence the sole proximate cause or a substantial factor in bringing about his injury?

If you should find that it was not, then you must return a verdict in plaintiff's favor, but reduced by that amount of damages which is attributed to the plaintiff's own negligence. If you should find that it was the sole

proximate cause or substantial factor, on the other hand, you will return a verdict for the defendant.

The plaintiff's second claim is based on what the law generally refers to as a manufacturer's strict products liability. This involves no concept of negligence.

Generally stated, when a manufacturer puts into the public market a product which he manufactures, designs or assembles, and which is defective, that is, one not reasonably fit for its intended purpose or use, and such defect is a proximate cause of damages or injury to a person, the manufacturer is held liable for the resulting damage.

The plaintiff claims that the truck was defective because of the way it was designed, and as a result defendant should be strictly liable for injuries caused by the defective design.

The plaintiff contends that the design of the truck was defective by virtue of the placement of the gasoline tank in the rear of the passenger compartment.

This, he alleges, allowed gasoline vapors to escape into the passenger compartment and ignite when the driver turned the ignition switch.

General Motors denies plaintiff's claim in its entirety, and therefore the burden of proof rests upon the plaintiff to prove the material facts and issues by a

preponderance of the evidence. Moreover, General Motors has alleged that plaintiff was contributorily negligent in that Mr. Hughes, by his own admission, knew that the truck was in a substantially deteriorated condition and yet disregarded the danger of riding in this truck and continued to ride in it up to the time of the accident.

In order to prevail on this case plaintiff must establish the following elements by a fair preponderance of the evidence:

- (1) That a defect of design or manufacture existed in the construction of the truck, that is, that it was not reasonably safe for its ordinary or intended use or purpose;
- (2) That such defect existed at the time the truck left the control of General Motors; and
- (3) That such defect was a proximate cause of the accident and injuries sustained by plaintiff.

The law imposes a duty upon the manufacturer of a truck to use reasonable care in its design to avoid subjecting the user or passenger to an unreasonable lisk of injury in the event of an accident. But the manufacturer of a truck is not a guarantor that nobody will be hurt in using the article. All the manufacturer is required to do is to make a product which is free from defective conditions.

A product is defective if it is not fit for the ordinary purpose for which such articles are sold. Establishing this element requires proof in a general sense that something was wrong with the product. A product is not defective merely because it is possible to be injured while using it. Thus, the mere occurrence of an accident is not sufficient to establish that the product was defective. However, additional circumstancial evidence, such as proof of proper use, handling or the operation of the product and the nature of the malfunction may be enough to satisfy the requirement that something was wrong with it.

Further, a defective condition can also be proved by the testimony of an expert who has examined the product or who offers an opinion on the product design.

In determining whether this product is defective, you should also consider the generally accepted concepts and practices with respect to the design and installation of gasoline tanks prevailing for trucks of this nature in 1366. Thus, you may consider whether other manufacturers were placing gasoline tanks in the trucks in the same manner as General Motors when they built them in 1966.

However, it is not enough for plaintiff here merely to establish that something was wrong with the truck.

Plaintiff must also satisfy the requirement that the defect

was present while it was in the control of General Motors.

This may be shown by one of three methods:

rirst, an expert's opinion that a product's design was defective by its very nature establishes that the defect arose while in the control of the manulacturer.

Second, circumstantial evidence may be used to permit an inference that the defect existed prior to sale.

In determining whether a defect existed prior to the sale of the truck here in 1006, you may consider the age and prior usage of the truck in relation to its expected lire span, durability and effective operability without proper maintenance. The age of the truck is especially significant, since, generally speaking, the older a product is, the more difficult it is to prove that a defect existed while in the control of the manufacturer. To be sufficient, the circumstantial evidence offered by the plaintiff must cause you to infer that in the normal course of human experience an injury would not have occurred at this point in the truck's life span had there not been a defect attributable to the manufacturer.

Third, in the absence of either direct evidence that the truck was defective while still in the hands of General Motors or circumstantial evidence from which you may properly draw such an inference, it is necessary for the

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plaintiff to negate other likely possible causes of the accident for which the defendant would not be held responsible in order to make it reasonable to infer that a dangerous condition existed at the time the defendant had control.

For example, plaintiff should negate the possibility that the accident resulted from the lack of proper maintenance and operation of the truck. Therefore, unless you find that plaintiff has demonstrated that the maintenance the truck received was sufficient to keep it in safe and proper mechanical order, and that it was not abused by plaintiff or his fellow workers, you cannot find that the plaintiff has negated other likely possible causes of the accident.

Finally, the plaintiff must also prove by a fair preponderance of the evidence that the defects in the truck was a proximate cause of the accident. I have already explained that term to you and, briefly, it requires that the accident or omission play a substantial part in actually causing the damage or injury. However, if you find that the sole and only proximate cause of the occurrence was the conduct of someone other than the defendant, then the plaintiff cannot prevail and your verdict should be for the defendant.

The proof as to proximate cause may not rest on

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any speculation as to the way the accident or injuries occurred. If you cannot determine the cause of the accident or if you find that there are equal probable causes which cannot be attributed to the defendant, then the plaintiff will have failed to sustain his burden of proof as to defendant on this claim.

If you find that the essential elements of the plaintiff's claim have been established by a fair preponderance of the evidence the defendant is liable even though you may find and believe that the defendant exercised all possible care in the preparation and sale of the product.

Fault is not at issue in a strict liability case.

General Motors contends here also that the plaintiff was contributorily negligent in that he was riding in a vehicle he knew to be maintained in a dangerous condition. The concept of contributory negligence on this claim is somewhat different than in the negligence claim which I explained to you earlier. A plaintiff is barred from recovery only if both the following conditions are met: That the plaintiff knew of the defect and was aware of the danger, and then, with such knowledge, he proceeded unreasonably to use the truck. The issues, then, to be decided by you in determining the plaintiff's strict liability claim are as follows:

First: Was the 1966 General Motors truck involved in the accident defective? Was the truck defective?

If your answer to that question is "No," you will return a verdict for the defendant; but if your answer is "Yes," you have to determine a second issue, namely:

Second: Did the defect exist at the time the truck left the control of General Motors?

If your answer to that question is "No," you will return a verdict for the defendant, but if your answer is "Yes," then you must answer a third question, namely:

Third: Was the defect a proximate cause of the accident and injuries sustained by the plaintiff?

If your answer to that question is "No," you will return a verdict for the defendant; but if your answer is "Yes," then you have a fourth and final question to answer:

Fourth: Did the plaintiff know that the truck had a design defect and that, with such knowledge, he unreasonably used the truck?

If your answer is "No," you will return a verdict for the plaintiff; but if your answer is "Yes," then you will return a verdict in favor of the defendant.

We now reach the question of damages. Of course, you'll only have to decide damages if you find that plaintiff

 has sustained his burden of proof as to either of his claims against the defendant. If the plaintiff has failed to establish these claims, you do not have to consider damages at all. My charge to you on the law of damages does not mean that you should assume that I feel that the plaintiff is entitled to damages. Deciding this case is your function, not mine, as I have indicated to you earlier.

Now, in assessing the damages, your aim should not be to make the plaintiff rich at the expense of the defendant. Your aim should be to award the plaintiff a sum of money which would be fair and reasonable compensation to him for the injuries he has received as a result of the defective truck or the negligence of defendant. You are to be guided by your common sense and experience.

The plaintiff, on all items of damage, has the burden of proof, that is, the evidence which he offers in support of the particular items for which he seeks recovery must be more persuasive than the evidence opposed to it.

Specifically, in order to recover for a particular item of damages plaintiff must prove by a fair preponderance of the evidence either that the defendant's negligence or the defect in the truck was a proximate cause of that item of damages. If you should find that plaintiff has met the burden of proof, you may award damages for the

following:

(1) The reasonable doctors', nursing, hospital and other incidental and related expenses necessarily required for his treatment from the date of the accident to the present; that is, August, 1971 to date, and that sum \$29,103.58.

- (2) Future medical, surgical, hospital and other related expenses reasonably required in his further treatment;
- (3) Loss of wages from the date of the accident to the present. The salary from the date of the accident to April 23, 1975 is \$26,508.36.

I have given you these figures. You have heard testimony that the plaintiff's medical bills and salary have been paid. However, it is agreed that you are to disregard that testimony and in calculating damages you may take into account the fees for medical expenses and loss of wages which I have just quoted.

You take into account the evidence of Mr. Hughes' earning capacity before the accident, and determine what he reasonably would have earned had he not been disabled. Also, you take into account the increases in wages that you find were granted to date, but that figure we have given you.

(4) Future loss of wages;

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- (5) Pain, suffering and mental anguish already suffered by him and proximately resulting from the injuries he sustained as a result of the accident;
- (6) Such pain, suffering and mental anguish as you may find he is reasonably certain to suffer in the future from the same cause.

The damage items to date are fairly calculable.

They are the medical costs and other expenses, loss of wages from the date of the accident to the present, and all pain and suffering.

The award for future losses obviously turns on matters that cannot be determined with certainty or precision. How long is it likely that plaintiff will live? What is his life expectancy? How long is it likely that plaintiff would have continued to work -- his work expectancy as distinguished from his life expectancy?

Your determination of the plaintiff's life expectancy and work expectancy play an important part in evaluating the award for future medical expenses, future pain and suffering, and prospective loss of wages.

According to the mortality tables issued by the United States Department of Health, Education and Welfare, his life expectancy, or the life expectancy of a person of plaintiff's age, is 29.8 years. I am giving it to you as

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

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of this date, since I have already indicated that any award up to this date is separate.

The life expectancy tables are based upon studies which estimate the probable average length of life of all persons of a specified group, of a given age. It applies to one who has average health and exposure to danger of people at that age. It is simply an estimate based upon past experience. It is not binding upon you.

We know that some individuals within the specified age group will live longer and others will die before one statistical life expectancy. Thus, you are called upon to decide plaintiff's life expectancy, taking into account the state of his health, his work habits, and other relevant factors.

According to a work expectancy table published by the United States Department of Labor, plaintiff has 22.3 years of work life remaining. In this instance, too, you will estimate his probable work expectancy, taking into account the relevant factors.

Then, as to future medical expense. You have heard the testimony as to the likely amount of medical and other required expenses. You should include any reasonable and necessary expense to the plaintiff for medical, surgical, hospital and other services and care and supplies, which you

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find from the evidence in this case are reasonably certain 2 3

to be required in future treatment of the plaintiff, as a proximate cause of the injury in question.

Plaintiff's estimated life expectancy should be considered by you in determining this amount.

The plaintiff is also entitled to a sum as will reasonably compensate the plaintiff for any loss of future earning power proximately caused or caused by the injury in question, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future. In determining this amount, you should consider what the plaintiff's health, physical ability and earning power were before the accident and what they are now. The nature and extent of his injuries, whether or not they are reasonably certain to be permanent or, if not permanent, the extent of their duration, all to the end of determining, first, the effect if any, of his injury upon his future earning capacity and, second, the value of any loss of future earning power.

Plaintiff claims that the injury in question is of a permanent duration. Plaintif's estimated work expectancy, rather than life expectancy, governs here.

Now, finally, as to the element of damages for pain and suffering experienced by Hughes to the present, and such future pain and suffering he is likely to endure in the

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future, there is no yardstick or mathematical formula to guide you. Use your good judgment and common sense, taking into account the nature and extent of the injuries and those you find to be permanent. The suggested damage figures given to you by the plaintiff's attorney in summation is his view and you are not bound by that.

What damage, if any, Hughes should be awarded is for you and for you alone to decide.

You are not to award damages for any injury or condition which the plaintiff may have suffered or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition is proximately caused or caused by the accident in question.

If you should find that the plaintiff is entitled to a verdict, in fixing the amount of your award you may not include in, or add to an otherwise just award any sum for the purpose of punishing the defendant or to serve as an example or warning to others. Nor may you include in your award any sum for court costs or attorney's fees.

Each juror is entitled to his opinion and you are required to exchange your views with your fellow jurors. This is the very purpose of jury deliberation. It is your duty to discuss the evidence. If you have a point of view and if after discussion with others it appears that your

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decision is open to question, then you should, of course, have no hesitancy in yielding your point of view. That is only if you are convinced that the opposite point of view is really one which satisfies your own judgment.

However, you are not to give up a point of view that you conscientiously believe in simply because you are outnumbered or outweighed.

The verdict which you return in this court must be unanimous. When you retire to the jury room you may send for any exhibits which have been received in evidence and you may ask to have any of the testimony or any instructions read back to you.

Ladies and gentlemen, I will proceed in the robing room with counsel. We will go over the charge to make sure that I have not omitted something that I should have said or said something which I ought not to.

(In the robing room.)

MR. ELKIND: Do you want additions first or just exceptions?

THE COURT: I want exceptions.

MR. ELKIND: Very well, your Honor. Although
your Honor did mention in the course of the charge the
direction to the jury or instruction that it could be more
than one cause to a single injury — you did mention that at

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one point in your charge -- but later on as the charge went on your Honor constantly referred to a need for the plaintiff to establish that both the design negligence and the defective condition of the truck were the proximate cause.

THE COURT: I said a proximate cause.

MR. ELKIND: The record will reflect it. The record will reflect the fact. Without taking into account on each of those cases, that is, your Honor, at least from my standpoint, a sufficient number of times to reinforce the jury's knowledge on the subject.

THE COURT: I will make sure that it is a proximate cause. I thought I said that.

All right, go ahead.

MR. ELKIND: On the contributory negligence charge of your Honor, I respectfully except to both the contributory negligence charge as given on the negligence count and to the strict liability count.

Going in reverse order, my notes indicate that after discussing contributory negligence the defense to the strict liability count, you mention this issue of improper maintenance or, rather, deteriorated condition, whereas our request to your Honor was a charge that the only defense that would be in the contributory negligence family on the strict liability count was mainly using the truck with

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knowledge that it had been a design defect and that the design lefect was known to the plaintiff.

I also believe, your Honor, that the charge on sole contributory negligence --

THE COURT: I think I said that.

MR. HAGAN: I think you did too.

MR. ELKIND: You mentioned to them both. That is the problem. One should be a defense point; the one that should be a defense of knowingly using the truck with an awareness that the defective condition existed.

THE COURT: You are in error. You are getting my strict liability negligence and the one on negligence confused.

MR. ELKIND: Also, your Honor, I would take exception to the propiety of giving the contributory negligence charge as a sole factor in which event you suggested if the jury makes such a finding it must find for the defendant.

I fail to see anything in the record in this case that would warrant that kind of instruction. I just don't think the record justifies it.

THE COURT: The contributory negligence charge is justified. I'm required, I think, to give the charge as the law requires it to be given in this case. What is

next?

MR. ELKIND: I would also take exception to that portion of your Honor's charge which, in words or substance, introduced the factor of maintenance -- that it was a piece of junk -- to the strict liability count.

Our position on that, your Honor, is that the only maintenance that would be relevant to this strict liability count would be the maintenance which related to the design defect and here the undisputed evidence is that there was no maintenance necessary with respect to the design features by the plaintiff in this case.

Also, your Honor, I take exception to that portion of the charge on strict liability in which you indicated that the criterion for finding a defect in design was reasonable care, and although you later said something to the contrary, I think that your instruction to the jury with respect to that standard is prejudicial to the plaintiff.

THE COURT: I think that is what the law is.

MR. WASSERMAN: There may be one other thing:
When you charged on the method of establishing a defect in
design you alluded to the age of the truck and the maintenance
although you stated the Jacobowski principle, which was also
repeated in the Scanlin decision, and I believe your Honor

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neglected to include the portion of the Scanlin decision that stated that mere age alone may not be sufficient to preclude an inference of defect existing in the hands of the manufacturer.

THE COURT: I think I fully charged it when I said: You have to consider the age and also have to consider the question that the older the product is, as I said, the more difficult it is for you to prove there was a defect.

What else?

MR. ELKIND: In your charge?

THE COURT: Yes.

MR. ELKIND: In your charge you mentioned that the other manufacturers had a similar design, and you may have even mentioned Ford and Chrysler. I don't know.

THE COURT: I did not.

MR. ELKIND: The jury, you said, should take that into consideration. I think that you should also add to that instruction the fact that other automobile manufacturers used or incorporated a similar design does not mean that the design used by all the automobile manufacturers mentioned or the three manufacturers mentioned was not defective design.

THE COURT: Mr. Hagan.

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MR. HAGAN: I have no exceptions.

THE COURT: Are you through with your exceptions,

Mr. Elkind?

MR. ELKIND: Yes.

MR. HAGAN: I have no exceptions.

MR. ELKIND: Do you want the comments on the form of verdict at this point, your Honor?

THE COURT: What about additions?

MR. ELKIND: I would ask your Honor to make the additional charge with respect to the fact that the other automobile manufacturers used a similar design only means for their consideration that if they so find that all the manufacturers used that design may have been using a defective design.

THE COURT: I think my instruction is clear. It is just a factor for them to make a determination on, that is, whether it was defective or not.

MR. ELKIND: May I ask your Honor to give a supplemental charge with respect to a proximate cause and alternative proximate causes and the burden of plaintiff in this case is not to prove that any design defect or the design negligence was the sole proximate cause?

THE COURT: I thought I had made that clear, but I certainly had intended to and I indicated that in the

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cause. I may have said the proximate cause. I certainly never said sole. I will say "a." All right.

MR. ELKIND: I have nothing else.

THE COURT: Do you have anything?

MR. HAGAN: No.

THE COURT: What about the special verdict?

M. ELKIND: I would take exception to submitting this form of special questions to the jury.

THE COURT: I am going to do that, I think.

MR. ELKIND: I take exception.

THE COURT: I think I am required to do that.

MR. ELKIND: I would call your attention to the following questions which I think should be revised. question number two, I believe, should read "Was defendant's negligence one of the proximate causes of the injury?"

THE COURT: I can say "a proximate cause."

I'll change that.

MR. ELKIND: As to question number four, I think that is incorrect in that it permits the jury to find for the defendant if plaintiff's contributory negligence is either the sole proxim to cause or a substantial factor in bringing about his injury. I don't think that his contributory negligence would bar recovery if it is a

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1038 substantial factor in bringing about his injury. I don't

think that is correct.

MR. HAGAN: In four, if we are going to change two, it should read "Was plaintiff's contributory negligence a proximate cause," rather than "the sole proximate cause."

MR. ELKIND: Absolutely no.

MR. HAGAN: You can't have it both ways.

R. ELKIND: There is an effort to make a jury determination on the question of whether or not --

THE COURT: No, no. I reject both of those, as I think I have stated, absolutely. Plaintiff can recover if it is a proximate cause and the defendant. If there were two proximate causes, defendant's and plaintiff's, then it is going to be reduced. I'm leaving that unchanged.

You may have your exception to that.

MR. ELKIND: On question five, your Honor, I think that is in a form which just refers to whether or not the truck was defective and it is prejudicial and misleading. I think what the issue is is whether the design of the 1966 truck was defective. We are talking about a design defect rather than any defect that may have come about as a result of wear and tear, use or abuse, lack of maintenance.

MR. HAGAN: That is covered in number six.

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THE COURT: I think it is clear, Mr. Elkind.

MR. ELKIND: Number six should also refer to a design defect, and seven should be a proximate cause.

THE COURT: I have changed number seven.

MR. ELKIND: That concludes my comments with respect to the special verdict.

THE COURT: All right.

Do you have anything, Mr. Hagan?

MR. HAGAN: No, your Honor.

THE COURT: All right.

(In open court, jury present.)

be sure you understand: When I indicated that the plaintiff'.

burden of proof was on both claims, that is, his strict

liability claim and the negligence claim, that the truck

was negligent in design and that it was defective in design,

I think that his burden was to show that the defect or the

negligence was a proximate cause of his injury, a proximate

cause, and I want you to bear in mind that if I said "the

proximate cause" I meant "a proximate cause." All right.

mrs. Keer and Mr. Margolis, you are now excused and I want to thank you for your services and for being here promptly. I thank you for your attention and I gather that at this point you have overstayed your duty anyway. Please

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24 25 report to Room 109 and you can pick up your jury certificate: Thank you.

(Alternates excused.)

(Marshals were sworn.)

THE COURT: The jury may retire. I am giving you a special form so you can record your verdict.

(The jury left the courtroom at 11:20 a.m.)

THE COURT: I am going up to chambers to spend some time in getting a couple of opinions organized, and I would like your agreement, Mr. Elkind and Mr. Hagan, that if the jury wants an exhibit you and he can agree upon it and it can be sent in without the necessity of my coming back downstairs.

MR. ELKIND: That is quite all right.

Your Honor, I have been away from my office for quite some time. I wonder if Mr. Wasserman -- would it be agreeable to your Monor if I left and Mr. Wasserman remained?

THE COURT: If you want to do that it is fine with me. The only thing I wanted was the agreement that I need not come down merely to give the jury an exhibit.

IR. ELKIND: That is certainly all right.

THE COURT: If, however, obviously, they need to have the testimony read and things of that kind, I'm

afraid that you will have to be sound and I will have to come down. However, as to your leaving, you and Mr. Wasserman can work that out.

MR. WASSERMAN: I might just mention for the record that Mr. Hagan and Mr. Corrigan and I have gone through all of plaintiff's exhibits in evidence and we have stacked them all on the table, and they agree that all those exhibits that are in the plaintiff's file are those marked in evidence.

THE COURT: All right.

(Recess at 11:23 a.m.)

[Court Exhibit 1 marked at 11:40 reading: "All photos, testimonies of Hughes, Brennan and Ollert, and logs from the Department of Public Works, years 1969 through 1971 (red books)"]

(Pause.)

THE COURT: The jury wants the testimony of Hughes, Brennan and Ollert read.

(Jury present.)

THE COURT: Ladies and gentlemen, there must be something that you want from this testimony. I understand that the testimony of these three men are some 200 pages on direct examination and cross-examination. Why don't you go back -- I think I know what you want, but why don't you go

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2 back and decide what portions of the testimony you want. If you want it all read, we will do that, but 200 pages is quite long. We have only had testimony for five days, so

that it will take quite some time.

I would ask you to go back and have you discuss whether there is something out of that that you want, and then return.

(The jury left the courtroom.)

THE COURT: I suspect what they want is the description of how the accident took place by those witnesses. I had no idea that the testimony Mr. Brennan and Mr. Ollert was that long. Mr. Hughes talked about his injuries, but I'm sure they are not interested in that. There is no dispute about that.

(Pause.)

THE COURT: I sent in an inquiry through the Marshal and apparently they changed their mind, so we can be in recess.

(Recess.)

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(At 12:30 p.m., in open court, jury present.)

THE CLERK: Mr. Foreman, has the jury agreed on a verdict?

THE FOREMAN: Yes.

THE CLERK: Would you read the verdict, please?

THE FOREMAN: "Question No. 1, was defendant negligent? No.

If no, your verdict on the negligence claim will be for the defendant and you can proceed to Question 5.

"Question 5. Was the 1966 General Motors truck involved in the accident defective? Yes or no? No."

THE CLERK: All right. You say you find verdict for the defendant. As to Question 1, on the negligence claim, was the defendant negligent, and your answer is no. On Question 5, on the question of liability, was the 1966 GMC truck involved in the accident defective, your answer is no.

And so say you all.

MR. ELKIND: Your Honor, may I request that the jury be polled?

THE CLERK: Members of the jury, you heard your verdict as it stands recorded.

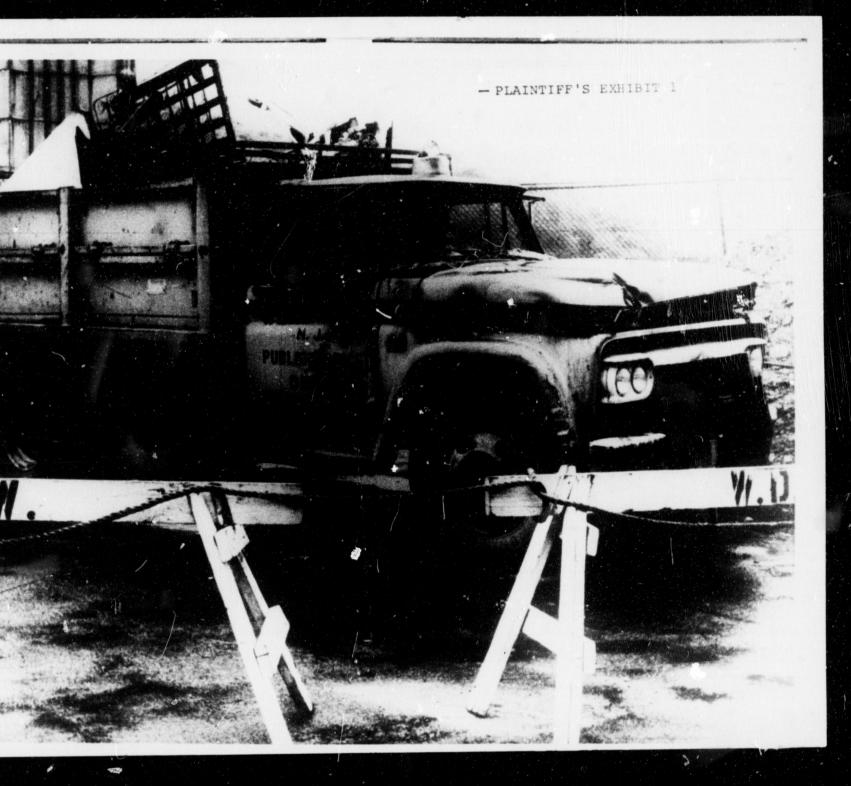
(Each juror upon being asked "Is that your verdict? responded in the affirmative.)

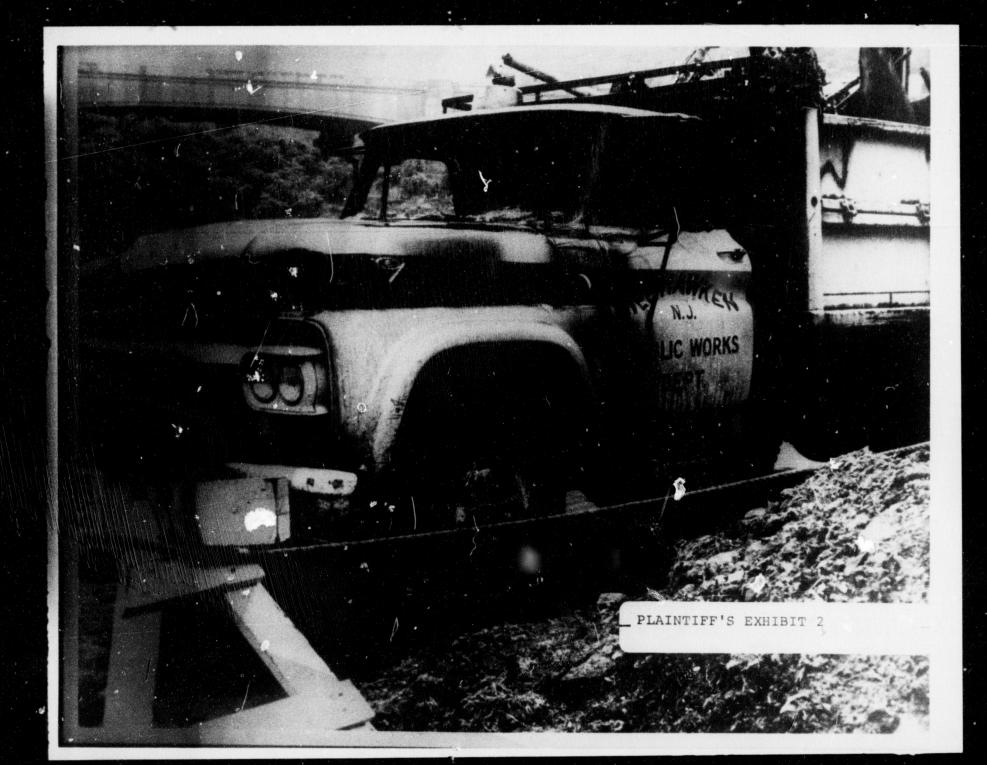
1 jgpd 2 THE COURT: All right. That means that your chores are now over and you can return to whatever you were 3 doing before jury duty. 5 I want to thank you for the time that you spent and the effort. I know it has been an inconvenience to 6 all of you and probably a sacrifice to some of you, but I 8 do hope that this experience indicates to you how important 9 it is that we have a jury and that some of us have to make sacrifices, otherwise the system can't work. 10 11 Thank you very much. 12 (Jury discharged.) 13 MR. ELKIND: Your Honor, may I make my motions 14 in writing? 15 THE COURT: Yes. 16 MR. ELKIND. In the period allowed by the rules? 17 THE COURT: Yes, of course. 18 Anything further, gentlemen? (Jury verdict marked Court's Exhibit 2.) 19 20 21 22

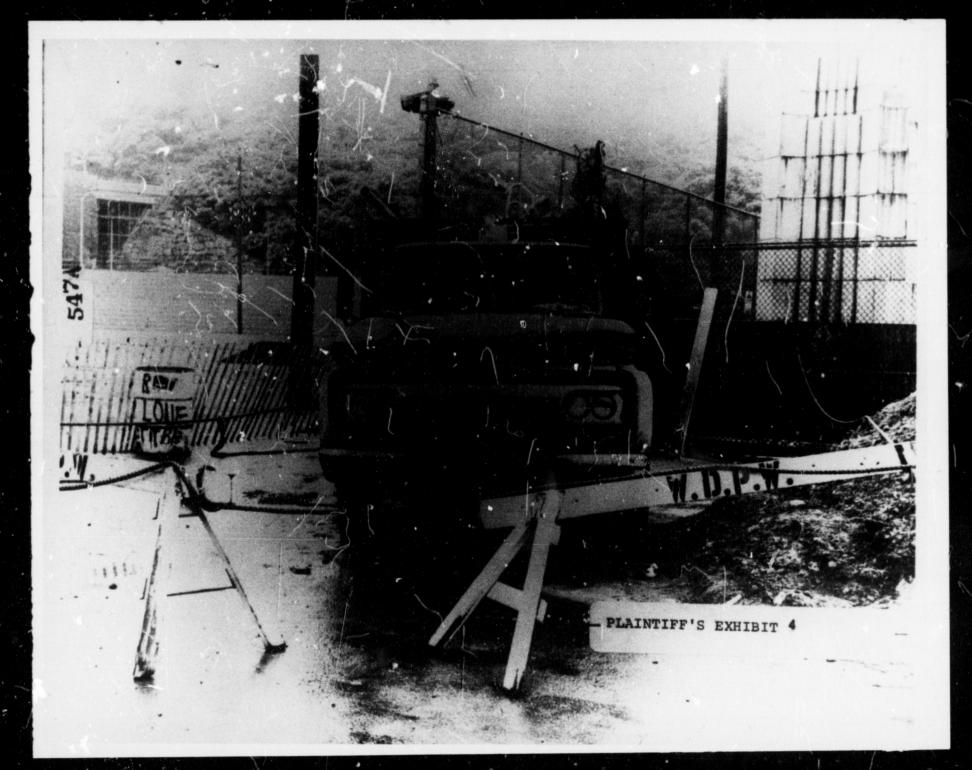
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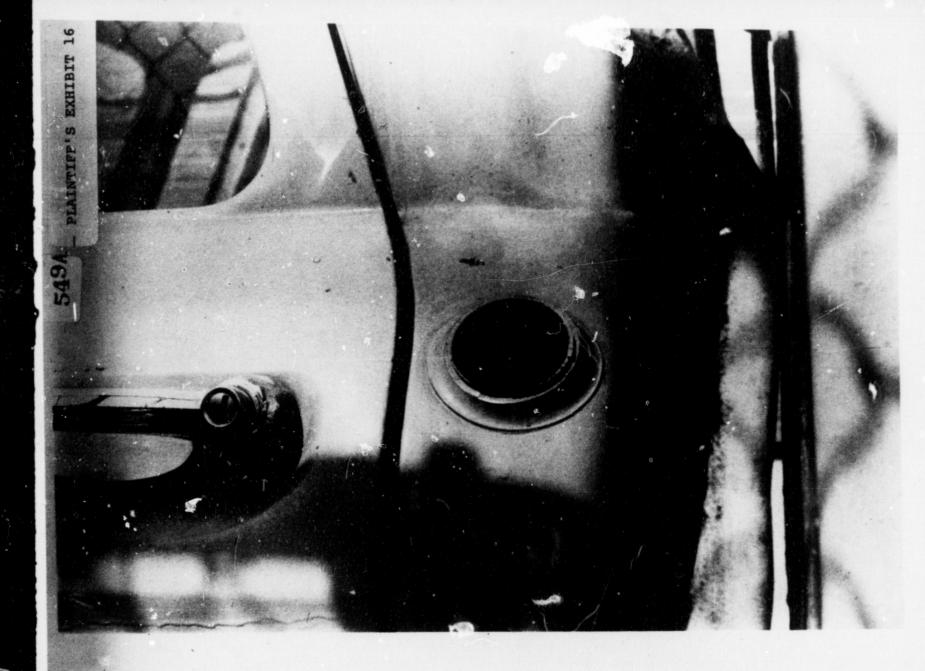


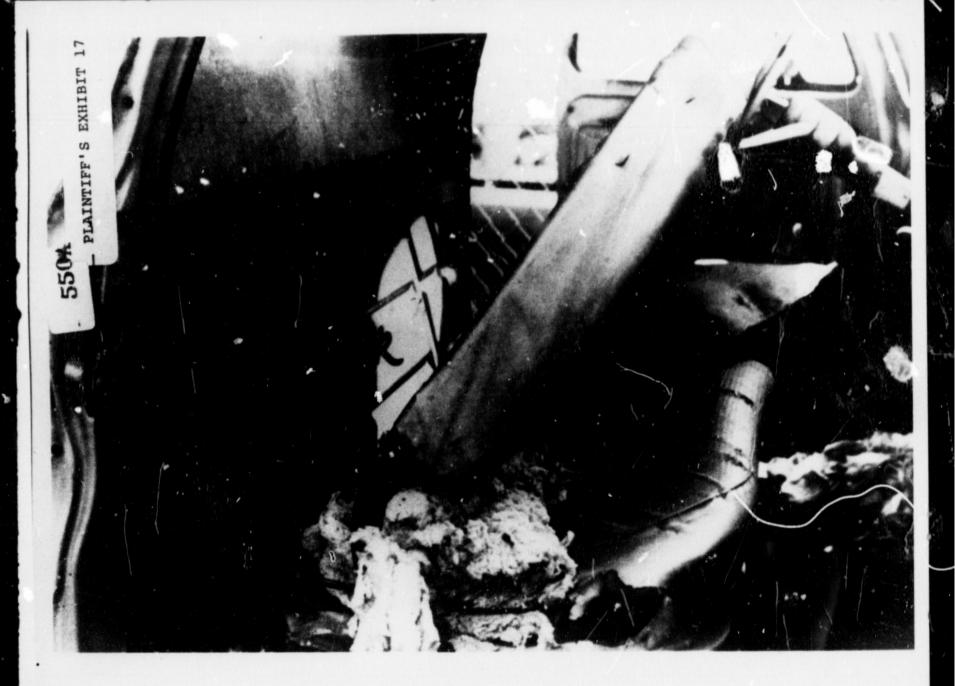




548A PLAINTIFF'S EXHIBIT 14







PLAINTIFF'S EXHIBIT 17 550M

BACK

TUBE

## JERSEY CITY FIRE DEPARTMENT ALARM RESPONSE RECORD

Report #399	FIRE:  DATE August 14, 1971  TIME  IN 11:1
ALARM: S/S 4113 Bell	Where did fire start? Truck fire.  Confined to starting point? Yes.
2nd Alarm	Extended beyond floor of origin?
DESCRIPTION OF PROPERTY:	Extended beyond building of origin?
Brick Stories Frame Stories Occupied as OTHER THAN BUILDING FIRES:	Water Yes. No. of Streams 2  Chemical  CAUSE Short circuit. 01-80.
Truck fire. Autos, Grass Fires, Dumps	Damage: \$1500. Insurance: Unk.
Assignment Responding:	Contents Contents Building Building
Engines 14 Trucks 7 Chief Officers BC Price. Special Apparatus	WATER STATEMENT: 500 Gallons Fresh Water (Approximately)
Reported by:	Hose and Ladders Used: 50'-3/4", 150'-12 Feet Hose, Stretched.
Third Zattalion Chief	Feet Ladders, Raised.
TC/-3	(See Other Side)

KS:- Vehicle: 1966 G.M.C. 4000, dump truck, Lic. #MGV 686 NJ.

mer: City of Weehawken (Dept. of Public Works).

Decupant:—Charles B. Brennen, 3338 Park Ave., Weehawken. (Operator of truck)
Henry Collert, 63 Chestnut St., Weehawken.
Richard Hughes, 189 Hackensack Plank Road, Weehawken.

njuries to Civilians:

Charles B. Brennen, age 39, 2nd degree burns of face, back and arms. Henry Collert, age 53, 2nd degreee burns of face and arms. Richard Hughes, age 39, 1st, 2nd and 3rd degree Burns of face, back and arms. (Report forwarded)

HIBIT 24

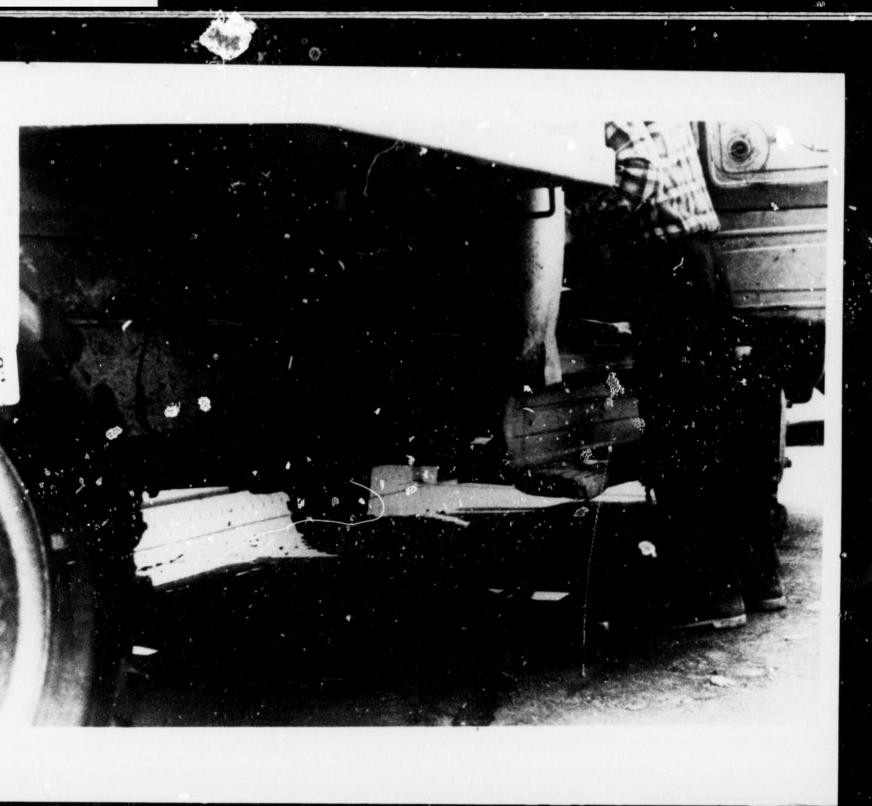
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PLAINTIFF \*S











#### 2,779,498 FUEL TANK AND FITTING

Edward N. Cole, Detroit, and Edward J. Naudzlus, Birmingham, Mich., assignors to General Motors Corporation, Detroit, Mich., a corporation of Delaware Application September 3, 1954, Serial No. 454,110

1 Claim. (Cl. 220-86)

to fuel or gasoline tanks employed in vehicles and to which tube members are attached as fittings to facilitate filling of the tanks.

When fuel tanks are made with filler tubes integral therewith, the devices constitute cumbersome pieces which are difficult to ship and to store. The tubes are generally of considerable length which factor must be considered in providing sufficient space for the shipment or storage. Handling of the devices is not only difficult because of the tubular pretuberances but it must be with care as any undue strain in the junctions between the tubes and the corresponding tanks may cause damage and leakages. In place of making the filler tube and tank as an integral unit, it has sometimes been the practice to make those parts separately and ultimately to connect them in a vehicle by means of a flexible conduit and suitable clamps. This latter expedient is not entirely satisfactory as leakages may occur at either or bot. of the two joints necessarily formed and the installation in a given vehicle cannot be carried out as expeditiously or 30 as quickly as would be desired.

An object of the invention is the provision of a fuel tank in combination with a tubular filling spout member which is attachable or detachable from the tank in a construction which provides an improved seal joint.

Another object of the invention is the provision of a fuel tank with a tubular filling spour member having a sealed universal connection leading to the tank.

A feature of the invention resides in a fuel tank having an inlet tube member affixed thereto and a filler tube member telescopically arranged with respect to the inlet tube member and sealed thereto by means of an annular ring of resilient and tough plastic material resistant to the chemical action of the fluid to be placed in the tank.

Another feature comprises tubular members cooperatively serving as feed inlet means for a fuel tank and 45 these members being universally movable with respect to each other and provided th stop means for limiting their relative axial movement.

These and other important features of the invention will now be described in detail in the specification and 50 then pointed out more particularly in the appended claim. In the drawings:

Fig. 1 is an elevational view with portions in section and showing an automobile gasoline tank and an inlet tube member associated therewith, the construction em- 55 bodying one form of the present invention; and

Fig. 2 is an enlarged view partially in section of a portion of the construction shown in Fig. 1.

In the illustrated apparatus a conventional fuel tank 10 is shown adapted to be mounted in a horizontal position 60 at the rear end of an automobile. In the present instance, however, the upper portion of the tank is provided with an opening 12 defined by a marginal portion 14 which is welded at 16 to an inlet tubular member 13. member 18 is outwardly flared at its outer end 20 and 65 telescopically receives one end of a tubular filling spout member 22. The other end of the member 22 is provided with a supporting bracket arrangement generally indicated at 24 by means of which the member may be held to a portion 26 of the vehicle body. The filler tube 70 member 22 is curved and extends in an upward direction so that one end is convenient and accessible for the

introduction of fuel, and has secured thereto a removable cap 23.

The end of the tube member 22 that extends within the member 18 is formed with an annular groove 30 for the reception and retention of a sealing ring 32. The member 22 is also provided with an annular ridge or shoulder 34 which constitutes a stop means finiting inward and axial movement thereof with respect to the spout member 18. It will be noted that an annular space This invention relates to tanks and more particularly 10 36 is provided between the two members 13 and 22 because of the relative proportions of the latter. A space 37 is also provided between the extreme end of the tube 22 and the member 18.

The sealing ring 32 is made of a plastic material of 15 extreme toughness but which is also fairly soft, flexible, non-porous and unaffected by the fuel as for example, a polymerized tetrafluoro-ethylene known commercially as Other plastics such as polyethylene or vinyl Teflon." chlorides, fluorides, or mixtures of them may also be used. Neoprene or any rubber of suitable toughness and softness and which is not adversely affected by the fuel or liquid to be handled will be satisfactory.

It will be seen from the above that tanks 10 with the short inlet tube members 18 permanently affixed thereto should present no problems in shipping, storing or installing as they constitute compact units which are easily handled and have no awkward protuberances. It will also be understood that when a given tank 10 has been installed in a vehicle, it is an easy and quickly performed operation to insert a tubular filling spout member 22 with a ring 32 in place thereon so that the members 10 and 22 are brought into telescopic and sealed relation. Alignment of the parts is not critical as the clearances 35 and 37 and the nature of the sealed joint en ploying the ring 32 permit great latin. le in supporting the upper end of the member 22 by the . acket arrangement 24, tube 22 cannot enter the tube member 18 for too great a distance because of the stop shoulder 34. Movement of the tube 22 in the other direction or away from the tank 10 is prevented by the connection of the bracket 24 with the body portion 26.

We claim:

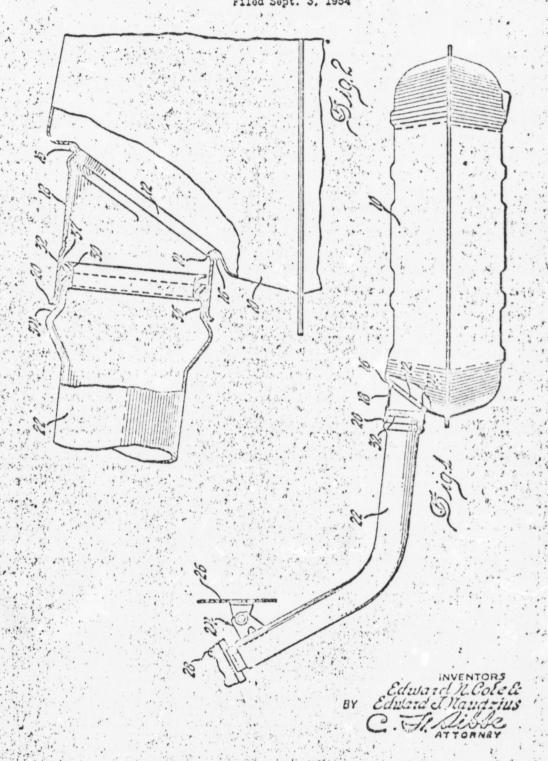
A fuel tank for use on an automotive vehicle, said tank being provided with an inlet tubular member having an annular flared edge at one free end and another end joined integrally and permanently to an upper side portion of said tank, a curved filling spout member with one end portion arranged remote from said tank and being fitted with a bracket arrangement for support on said vehicle and the other end portion of said spout member being arranged in telescopic relation with said tubular member, said bracket arrangement being adapted to prevent longitudinal movement of said spout member, a groove formed in said other end portion of said spout member, an annular sealing ring of tough flexible plastic material retained in said groove and resiliently pressing outwardly against said tubular member, a stop shoulder formed on said spout member as an annular ridge facing the said flared edge, and a clearance being provided between said members to permit universal movement adequate to compensate for variations in the relative positions of said tank and bracket arrangement.

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Jan. 29, 1957

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CHARLES E. MILLER, COMMISSIONER

### TOWNSHIP OF WEEHAWKEN NEW JERSEY

PUBLIC WORKS DEPARTMENT

August 14, 1971

RE: TRUCK FIRE - PERSONAL INJURY.

At about 11:00 AM I received a call at my home from my Parks Foreman Henry Zeeb that the Department of Public Works dump truck #2 had caught fire on Rts. #1 and #9 in Jersey City and that the (3) three men crew had been taken to Jersey City Medical Center.

I called the hospital and learned that (2) two of the men Charles Brennan (driver) and Harry Ollert (heavy laborer) were treated and released and the other man Richard Hughes (heavy laborer) was being detained. I proceeded to my office and upon arriving there I found the truck being towed into the yard by the Highpoint Garage tow truck.

About 11:35 A.M. my Street Foreman Thed. Haneszek, who had gone to the hospital arrived with the two men who had been released. Noting that they both had burns on their face and arms I had them tal to North Hudson Hospital to see if they should be hospitalized, they were examined and released.

Upon questioning Mr. Brennan and Mr. Ollert I received this story:

Mr. Brennan (driver) stated that at 8:00 AM this morning (8/14/71) he checked out truck GMC Dump #2 for oil, gas and water and noticed that they had a half tank of gas which would be enough to do the route and the round trip to the dump. After finishing the route he started for the dump taking Rts. #1 and #9 south to Secaucus Road.

About a half a mile from the Secaucus road he noticed that the gas gauge was dropping very fast and not wanting to run out of gas before reaching the dumps, he stopped at an Esso station on #1 and #9 and purchased \$ 2.00 worth of gas, he gave the attendant a \$ 10.00 bill and after receiving his change he turned the key to start the truck and the entire cab of the truck became enveloped in flames. He and the other two men jumped from the truck and put out the fire on their clothing.

At this time the truck began to roll (emergency had been released) and rolled into Rt. #1 and #9.

The Fire department responded and the police department conveyed the men to the hospital.

cc: Mayor's office Township Clerk Township Attorney Insurance

Respectfully submitted, Respectfully Storm, Supt. Y

Weehawken Dept. Public Works



### TOWNSHIP OF WEEHAWKEN NEW JERSEY

FIRE DEPARTMENT MUNICIPAL BUILDING

ROBERT M. CAHILL

FICE OF THE CHIEF OF DEPARTMENT

:

August 16, 1971

Charles E. Miller, Cormissioner of Public Works

Moe howken Fire Department M:

Investigation of fire in Public Works truck #2 JI:

As per your request, this department assigned which Lennon to investigate the possible cause of which Works truck # 2 that occured on Saturday ıt ; rest 14, 1971 in Jersey City.

cab and motor were fully involved and due to .... o corrage to both the cab and motor it is difficult in the cob behind the front seat. The carburetor Lo. nes or the motor were melted by the fire.

the possible cause of fire was the accumulation as ora either from the motor or the gas tank. The ii o cruse of ignition was the self-storter.

The report of the men in the cab at the time ic: no that no gas fumes could be detected and no one sr in.

This department recommends that a fire report ecored from the Jersey City Fire Department and a ort be secured from the attendant at the gas station are the fire started.

Respectfully submitted,

Robert M. Cahill Chici of Department

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

71 Civ. 1811 (RLC)

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Arnold B. Elkind, sworn to the 4th day of June, 1975, the undersigned will move this Court before the Honorable Robert L. Carter, at a time and place to be set by the Court, for an order setting aside the judgment in favor of the defendant entered on the 28th day of May, 1975, and ordering a new trial.

Dated: New York, N.Y.
June 4, 1975

Yours, etc.

/s/ ARNOLD B. ELKIND

ARNOLD B. ELKIND

Attorney for Plaintiff
122 East 42nd Street
New York, N.Y. 10017

TO:

SIMPSON THACHER & BARTLETT, ESQ. Attorneys for Defendant One Battery Park Plaza New York, N.Y. 10004

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

72 Civ. 1811 (RLC)

STATE OF NEW YORK )

COUNTY OF NEW YORK)

ARNOLD B. ELKIND, being duly sworn, deposes and says:

SS.:

l am the attorney for the plaintiff above named and make this affidavit in support of a motion for a new trial.

May 28, 1975, the jury found that General Motors was not negligent and that the truck involved in the fire was not defective. Plaintiff's theory, as outlined in the opening to the jury, focused on a potential leak in the filler tube assembly of the gasoline tank system which would permit gasoline vapors to fill the truck. The rulings of the Court, hereinafter rummarized, frustrated the presentation and introduction of the evidence which would have tended to support the plaintiff's contention that the filler tube assembly was defective and that the design of

the filler tube assembly was a negligent design:

- 1. The ruling of the Court in June of 1974. denying the plaintiff's application to examine Edward N. Cole, who was then President of General Motors and who had assigned a patent relating to an improved system for gasoline filler necks to General Motors prior to the manufacture of the truck involved in this litigation.
- 2. The refusal of the Court to permit the plaintiff to introduce into evidence the patent which contained a statement from which the jury could find that General Motors was aware of the risk of leakage from the filler neck assembly incorporated in the truck involved.
- 3. The refusal of the Court to permit evidence that the alleged design defect had been eliminated by General Motors in subsequent model years.
- 4. The refusal of the Court to permit the introduction into evidence of photographs showing the burned areas of the plaintiff's body, which would have tended to establish that the area of fire was from the vicinity of the plaintiff's left side, including the destruction of his left ear and burns of his left back.

These photographs would, in the opinion of counsel, have tended to support an inference that the filler tube assembly was implicated in the leakage of gasoline vapors.

- that the design of Chrysler and Ford with respect to the positioning of the gas tank was the same as the General Motors design, although there was no evidence with respect to the filler tube assemblies of Ford and Chrysler. The charge with respect to the other two major manufacturers was also prejudicial since the Court refused to couple with the charge an instruction that the design could be found defective even though it represented an industry-wide standard.
- 6. General Motors offered an explanation of the fire in the cab which subsumed the entrance of gasoline vapors through slots in the floor of the cab which were there by virtue of a post-delivery modification. The presentation of this evidence by the defense created for the jury alternative inferences as to whether the alleged design defect was or was not a substantial factor in bringing about the plaintiff's injuries. The plaintiff offered rebuttal expert testimony through Professor Weinstein to

contradict the defendant's suggested inference as to the source of gasoline vapors in the cab. The Court refused to permit such testimony and apparently was of the view that inferences were available to the plaintiff only if all other explanations of the event were eliminated.

7. The special verdict form submitted to the jury over plaintiff's objection was a blueprint for a path of least resistance fact-finding. The two questions answered in the negative by the jury gave no guidance with respect to the claim that was being made on behalf of the plaintiff, either with respect to negligence in design or the claimed defect an design.

For the foregoing reasons, it is respectfully submitted that the plaintiff is entitled to the following relief: (1) an order setting aside the verdict and judgment entered thereon, (2) an order for the deposition before trial of Edward N. Cole, and (3) a new trial.

/s/ ARNOLD B. ELKIND
ARNOLD B. ELKIND

Sworn to before me this 4th day of June, 1975

/s/ DOROTHY DRESSEL

Notary Public, State of New York No. 60-6099400 Qualified in Westchester County Commission Expires March 30, 1976 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1811 (RLC)

SAME TITLE

AFFIDAVIT

STATE OF NEW YORK )

COUNTY OF NEW YORK,

JAMES J. HAGAN, being duly sworn, deposes and says:

- 1. I am a member of the Firm of Simpson
  Thacher & Bartlett, attorneys for defendant General
  Motors Corporation ("General Motors") in this action
  and I submit this affidavit in opposition to plaintiff's motion for an order setting aside the judgment
  in favor of General Motors and granting a new trial.
- 2. I submit that all the points set forth by plaintiff in connection with this motion are without merit and that the arguments made clearly do not warrant any disturbance of the jury's verdict in this case.
- 3. In June of 1974 this Court denied plaintiff's application for permission to take the deposition of Edward N. Cole, then President of General Motors, ruling that the information sought by plaintiff

could be obtained without conducting an examination of Mr. Cole. The renewal of this pre-trial motion cannot serve as a basis for setting aside the judgme of after trial.

- 4. The Court at trial properly sustained General Motors' objection to the introduction in evidence of the patent application co-authored by Mr. Cole. It was clear that no proper foundation had been laid for the receipt of this document in evidence. The self-serving statement of an engineer applying for a patent do not constitute any form of notice to General Motors of any allegedly defective design. The fact that Mr. Cole was subsequently promoted to the presidency of General Motors, is, of course, irrelevant, and merely heighters the inadmissibility of this document.
- 5. The Court properly sustained General Motors' objection to any evidence concerning the discontinuance of the design at issue in this case. There was absolutely no indication that the change in design was in any way related to safety considerations or potential fire hazards. Accordingly, there was no foundation for the admission of this evidence.

- Motors' objection to the introduction in evidence of certain color photographs depicting the burned portions of plaintiff's body. The precise location of these burns was fully described by the treating physician. Moreover, as set forth in General Motors' memorandum of law submitted in connection with this objection, the minimal probative value of these photographs was vastly outweighed by their prejudicial nature.
- 1ating to the design of the fuel system of other automotive manufacturers at the time in issue was proper in all respects. The record reflects that there was competent testimony relating to these designs and that the charge in this regard was devoted to the question of the state of the art in the automotive industry at the time the subject truck was manufactured. There is no basis for concluding that the Court's charge gave rise to an implication that a jury could find a lack of defect merely because other manufacturers had a similar design.

- Motors' objection to the proffered rebuttal testimony of Professor Weinstein. Plaintiff simply attempted to elicit repetitive testimony from the witness, which is clearly improper on rebuttal. The areas of inquiry had been fully covered on direct examination of Professor Weinstein during plaintiff's case in chief.
- 9. The form of special verdict submitted to the jury was quite clear on its face and had been carefully drawn and reviewed by counsel for both sides. The special verdict form, coupled with the Court's instructions, gave proper guidance to the jury and was not complicated. There was no indication of confusion on the part of any juror.
- 10. After a thorough trial which involved / conflicting expert opinions as to the cause of the accident, the jury specifically found that there was no negligence in the design of the fuel system and that there was no defect in the truck at the time of the accident. There is no justifiable reason for disturbing this verdict and therefore the judgment

in favor of the defendant should stand.

For the foregoing reasons, it is respectfully submitted that plaintiff's motion should be denied in all respects.

/s/ JAMES J. HAGAN
JAMES J. HAGAN

Sworn to before me this 10th day of June, 1975

s/ Paul S. Mazurkewitz
Notary Public, State of New York
No. 41-7781470
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1976

RICHARD HUGHES v. GENERAL MOTORS CORPORATION (Memo endorsed on back of plaintiff's notice of motion and affidavit dated June 4, 1975)

6/19/75

Motion denied. Judgment to be entered in favor of the defendant.

So ordered.

/s/ Robert L. Carter U.S.D.J.

U. S. DISTRICT COURT FILED JUNE 20, 1975 S.D. OF N.Y.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SAME TITLE 72 Civil 1811 (RLC)

SAME TITLE 5

JUDGMENT

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Robert L. Carter, United States District Judge, and a jury on May 19, 20, 21, 22, 23, 27 and 28, 1975, and the Court having submitted the attached special questions to the jury, and the jury having answered the said questions, and the jury having returned a verdict in favor of the defendant, and plaintiff having moved to set aside the verdict, and the Court thereafter on June 20, 1975, having handed down its memorandum endorsement denying plaintiff's motion and directing judgment in favor or the defendant, it is

ORDERED, ADJUDGED and DECREED: That defendant GENERAL MOTORS CORPORATION have judgment against plaintiff RICHARD HUGHES, damissing the complaint.

Dated: New York, N.Y.
July 15, 1975

/s/ Raymond F. Burghardt Clerk

APPROVED:

/s/ ROBERT L. CARTER
U. S. D. J.

UNITED STATES DIST SOUTHERN DISTRICT O	RICT COURT OF NEW YORK		
		x	
RICHARD HUGHES,		:	17
	Plaintiff,	:	
- against	-	:	72 Civ. 1811
GENERAL MOTORS CORP	ORATION,	:	
	Defendant.	:	
	-,	x	

### Megligence Claim

1. Was defendant negligent?

(YES or NO)? 1/0

If "Yes," go on to Question 2; if "No," your verdict on the negligence claim will be for defendant, and you can proceed to Question 5.

2. Was defendant's negligence the proximate cause of any injury or damage to plaintiff?

(YES or NO)?

If "Yes", go on to Question 3; if "No", your verdict will be for defendant on the negligence claim. Proceed to Question 5.

. Was plaintiff contributorily negligent?

(YES or NO)?

If your answer is "No", then having found in plaintiff's favor in answer to the first two questions, your verdict will be for plaintiff on the negligence claim, and you will proceed Question 5; if "Yes," go to Question 4.

4. Was plaintiff's contributory negligence the sole proximate cause or a substantial factor in bringing about his injury? (YES or NO)?

If your answer is "Yes", you will return a verdict for defendant on the negligence claim, if "No", you will return a verdict in plaintiff's favor on the negligence claim, but any award to plaintiff will be reduced by the amount of damages attributed to plaintiff's own negligence, in accordance with Ouestion 10. Proceed to Question 5.

#### Strict Lability Claim

5. Was the 1960 GMC truck involved in the accident defective (YES or NO)?

If "Yes", go on to Question 6; if "No", you will return a verdict for defendant on this claim.

6. Did the defect exist at the time the truck

Jeft the control of General Motors (YES or

NO)?

If "Yes,", go on to Question 7; if "NO", you will return a verdict for def dant on this claim.

7. Was the defect the proximate cause of the accident and injuries sustained by plaintiff

(YES or NO)?

If "Yes", go on to Question 8; if "No", you will return a verdict for defendant on this claim.

8. Did plaintiff know that the truck had a design defect and that, with such knowledge, he unreasonably used the truck? (YES or NO)

If "Yes", you will return a verdict in favor of defendant on this claim; if "No", you will return a verdict for plaintiff.

#### Damages

- 9. If your answers to Questions 3 or 4 and/or 8 were
  "No", what amount of damages do you award to
  Richard Hughes? (exact amount)
- 10. If your answer to Question 3 was "Yes", and your answer to Question 4 was "No", what amount of plaintiff's damages is attributed to plaintiff's own negligence? (exact amount)
- 11. Subtract the amount in Question 10 from the amount in Question 11 and enter total here.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

72 Civ. 1811 (RLC)

NOTICE OF APPEAL

SIRS:

NOTICE is hereby given that Richard Hughes, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered herein on July 15, 1975.

Dated: New York, N.Y. July 22, 1975

Yours, etc.

ARNOLD B. ELKIND

ARNOLD B. ELKIND

Attorney for Plaintiff
122 East 42nd Street

New York, N.Y. 10017

TO:

SIMPSON THACHER & BARTLETT, ESQS. Attorneys for Defendant One Battery Park Plaza New York, N.Y. 10004

ATTORNEY TOP DESCRIPTION THACHER & BARTLETT

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